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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Georgia

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To the Supreme Court of Georgia

Petitioner, Michelin Tire Corporation, a New York corporation (herein "Michelin"), respectfully prays that a Writ of Certiorari issue to review that portion of the judgment and decision of the Supreme Court of Georgia, entered in this case on February 4, 1975, which holds imported tires to be taxable. Such decision and judgment became final for the purpose of review by this Court on February 18, 1975, when the Supreme Court of Georgia denied Michelin's timely motion for rehearing. The respondents herein are W. L. Wages, Robert L. Wilson, Jack Bramblett, Harold Prince and John Ratcliff, all tax officials of Gwinnett County, Georgia.

OPINIONS BELOW

The opinion of the Superior Court for the County of Gwinnett, State of Georgia, is not and will not be reported. Such opinion is attached as Appendix A hereto. The opinion of the Supreme Court of Georgia, and that Court's Order denying Michelin's motion for rehearing, are not as yet reported. They are attached as Appendix B and C hereto.

JURISDICTION

The opinion of the Supreme Court of Georgia was rendered on February 4, 1975, and became final, for purposes of review by this Court, when the Supreme Court of Georgia denied Michelin's motion for rehearing on February 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether tires imported by Michelin in bulk and without packaging, and held for sale by Michelin in its Gwinnett County warehouse, in the original form in which such tires were imported, are immune under the Import Clause of the Federal Constitution from Gwinnett County ad valorem property taxes.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Import Clause (Article I, Section 10, Clause 2) of the Constitution of the United States, which provides that: "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws; . . .".

STATEMENT OF THE CASE

Michelin, a New York corporation, is engaged in the business of importing into the United States automobile and truck tires and tubes manufactured outside of the United States and distributing such tires and tubes through franchised tire dealers.

As a part of such business, Michelin operates a distribution warehouse located in Gwinnett County, Georgia.

Tires and tubes imported by Michelin flow into such Gwinnett County warehouse from the factories outside the United States at which such tires and tubes are manufactured, and flow out from such Gwinnett County warehouse to franchised tire dealers scattered throughout six southeastern states. No sales of such tires and tubes are made by Michelin except to franchised tire dealers.

On all of such imported tires and tubes, Michelin has paid to the United States a 4% import duty.

The imported tubes with respect to which Michelin claims immunity from local taxation are imported in shipping cartons, and are held by Michelin in its warehouse in the original packages in which imported.

All of the imported tires are imported by Michelin in bulk, and without packaging. All of such imported tires are held by Michelin in its warehouse in the original form in which imported, and none of such tires are altered or modified in any way from the original form in which they were imported.

Michelin filed in the Superior Court of Gwinnett County, Georgia, this action seeking to enjoin the tax officials of that County from assessing and collecting Gwinnett County ad valorem property taxes on inventories of imported tires and tubes in Michelin's Gwinnett County warehouse.

In its original complaint, Michelin contended that such taxation is prohibited by the Import Clause of the Federal Constitution.

The case was tried in the Superior Court, and the Superior Court rendered its decision, Appendix A hereto, in favor of Michelin.

The tax officials appealed to the Supreme Court of Georgia, which (Appendix B hereto) upheld the immunity from tax with respect to the imported tubes held in Michelin's warehouse in the original packages in which imported, but denied immunity from tax with respect to the unpackaged imported tires, notwithstanding the fact that such tires were held by Michelin in its warehouse in the original form in which they were imported.

The Court based its decision with respect to the unpackaged imported tires on the ground that such tires lost their status as imports when they were segregated by size and style and commingled with other imported tires in Michelin's warehouse. Appendix B hereto, pp. A17-A18.

The Court recognized that the imported tires were held by Michelin in its warehouse in the original form in which they were imported. In its opinion it stated (Appendix B hereto, p. A7 that: "The individual tires are not treated or altered in any manner."

STAGE OF PROCEEDINGS AT WHICH THE CONSTITUTIONAL ISSUE WAS RAISED

As shown above, the constitutional issue was raised by Michelin in its original complaint herein, was decided by the trial court in favor of Michelin, and was decided by the Supreme Court of Georgia in favor of Michelin with respect to the imported tubes and adversely to Michelin with respect to the imported tires.

REASONS FOR GRANTING THE WRIT

A. The Supreme Court of Georgia Has Decided a Federal Constitutional Question of Substance in a Way Not in Accord With Applicable Decisions of This Court

It has long been established by decisions of this Court that imported goods are immune from local taxation while held for sale by the importer in the "original package" or in the "original form" in which imported.

In *Brown v. Maryland*, 25 U.S. 419 (1827), the Court (at 442) held with respect to imported goods which are held for sale by an importer, that "while remaining the property of the importer, in his warehouse, in the *original form or package* in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." (Emphasis supplied).

In *Hooven and Allison Company v. Evatt*, 324 U.S. 652 (1945), the Court affirmed (at 666) that: "Indeed, goods imported, while they remain in the hands of the importer, *in the form and shape in which they were brought into the country*, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of state government." (Emphasis supplied).

In *Youngstown Sheet and Tool Company v. Bowers*, 358 U.S. 534 (1959), the Court (at 540) quoted with approval from *Brown v. Maryland* the statement that one who had imported goods for the purpose of selling them, had, "by payment of the duty to the United States, (acquired the) right to dispose of his merchandise, as well as to bring it into the country," and that the State could not tax it "while remaining the property of the importer, in his warehouse, in the *original form or package* in which it was imported." (Emphasis supplied).

In *Florida Greenheart Corporation v. Gautier*, Fla. (1965), 172 So.2d 589, cert den 382 U.S. 825, the Supreme Court of Florida held that lumber imported in bulk and without packaging was immune from local taxation where held for sale by the importer in the "original form" in which imported. The Florida Court, after referring to the term "original package," said: "Where this expression has been used in the cases, *it has been used in juxtaposition with the words 'original form.'* This was the language used more than 100 years ago in the early case of *Brown v. State of Maryland* by Justice Marshall, 12 Wheat. 419, 25 U.S. 419, 6 L. Ed. 678. The cases since have held that the exemption attaches to the sale *in the original form or in the original package.*" (Emphasis supplied).

In *Citroen Cars Corporation v. City of New York*, 30 N.Y.2d 300 (1972), 283 N.E.2d 758, the Court of Appeals of New York held that automobiles, imported without packaging, are immune under the Import Clause of the Federal Constitution from local taxation so long as owned and held for sale by the importer, where no substantial physical change has been made in such automobiles from the form in which they were imported. In the Court's opinion, after discussing *Brown v. Maryland*. Judge Breitel (at 30 N.Y.2d 305) said: "At least, two points were made clear by the *Brown* decision. First, one who imports for sale has by payment of the customs duty acquired the right to sell the goods free from State taxation. Certainly this is true so long as the article remains in the importer's warehouse in the *form or package* in which it was imported." (Emphasis supplied).

The trial court below, in its decision herein, Appendix A hereto, correctly held (at A4) that the unpackaged imported tires are immune from local taxation while held for sale by Michelin, in its warehouse, in the "original form" in which imported.

The Supreme Court of Georgia, in its decision herein, Appendix B hereto, correctly recognizes and applies, with respect

to the packaged tubes which are held by Michelin in the original packages in which imported, the "original package" doctrine as established by the *Brown v. Maryland* line of decisions.

However, with respect to the unpackaged imported tires, which were held for sale by Michelin, in its warehouse, in the "original form" in which they were imported, the Supreme Court of Georgia ignores, disregards, and refuses to recognize and follow, the "original form" doctrine which is established by the *Brown v. Maryland* line of decisions.

In *Youngstown Sheet and Tube Company v. Bowers*, supra, this Court held, 358 U.S. 546, that goods imported for use in manufacturing had ceased to be imports and had become subject to local taxation where the "importation journey definitely had ended" and the goods were irrevocably committed to use in manufacturing at the "point of final destination."

By contrast, the imported tires here in question flow out of Michelin's Gwinnett County warehouse to franchised tire dealers scattered throughout six southeastern states, and therefore cannot reasonably be considered, while in such warehouse, as having reached the point where their "importation journey definately had ended" or as having come to rest at a "point of final destination."

In language which the Court quoted with approval in *Youngstown*, supra, at 540, footnote 6, the imported tires, while in the Gwinnett County warehouse, are "merely in transitu, and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported."

Such imported tires, while in the Gwinnett County warehouse, are still in the flow of import distribution, have not come to rest at a final destination in Gwinnett County, and have not

become, in the language of *Brown v. Maryland*, 25 U. S. 441, "incorporated and mixed up with the mass of property" in Gwinnett County.

The Supreme Court of Georgia is mistaken in suggesting that Michelin's activity with regard to the imported tires is comparable to that of Justice Marshall's "itinerant peddler". Appendix B hereto, p. A17. An itinerant peddler is selling goods at retail, whereas Michelin sells the imported tires only at wholesale. An itinerant peddler is selling goods for local consumption at the point of final destination, whereas the imported tires flow out from Michelin's Gwinnett County warehouse to franchised tire dealers scattered throughout six states, and it is such franchised tire dealers who sell the tires for local consumption at the point of final destination.

In *Standard-Triumph Motor Company, Inc. v. City of Houston*, 220 F. Supp. 732 (S.D. Tex. 1963), judgment vacated on jurisdictional grounds, 347 F.2d 194, cert den 382 U.S. 974, the District Court correctly held that unpackaged imported automobiles were "still in transit", and were still imports, where "the importation of these vehicles was for the purpose of distributing them to dealers throughout a five state area where they would then be sold and operated." 220 F. Supp. 734.

The Supreme Court of Georgia has thus decided a federal constitutional question of substance in a way that is clearly not in accord with applicable decisions of this Court.

B. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the State Court Decisions With Respect to the Immunity From Local Taxation of Unpackaged Imports.

The Courts of New York, North Carolina and Florida have recognized and given effect to the "original form" doctrine as

established by the *Brown v. Maryland* line of decisions, and have held accordingly that automobiles, tractor parts and lumber imported in bulk and without packaging are immune from local taxation where held for sale by the importer in the "original form" in which they were imported. *Citroen Cars Corporation v. City of New York* (1972), supra; *Wilson v. County of Wake*, N.C. App. (1973), 199 S.E.2d 665; *Florida Greenheart Corporation v. Gautier* (1965), supra.

The Courts of California, Louisiana, and now Georgia, ignore and disregard the "original form" doctrine which has been established by this Court in the *Brown v. Maryland* line of decisions, and hold that unpackaged imports lose their immunity from local taxation, although held for sale by the importer in the "original form" in which imported, if any single unpackaged article contained in a shipment is sold or is commingled with other imported goods. *E. J. Stanton & Sons v. Los Angeles County*, Cal. App. (1947), 177 P.2d 804, cert den 322 U.S. 766; *American Mannex Corp. v. Cronvich*, La. (1968), 207 So.2d 778; and the Georgia Supreme Court decision herein, Appendix B hereto.

The California and Louisiana decisions just cited are premised upon the theory that where goods are imported without packaging, the entire shipment constitutes an "invisible gossamer" package, 177 P.2d 808, which is broken when any single unpackaged article is removed from the shipment or is commingled with other imported goods.

Such "invisible package" theory is criticized and rejected by the courts of Florida and North Carolina in the *Florida Greenheart* and *Wilson* decisions cited above, and cannot be reconciled with the "original form" doctrine established by this Court in the *Brown v. Maryland* line of decisions.

Review by this Court is warranted to resolve the conflict in state court decisions.

C. Review by This Court Is Warranted to Resolve a Federal Constitutional Issue of Wide Import, the Resolution of Which Will Have Immediate Importance Far Beyond the Particular Facts and Parties Involved in This Case.

The issue involving immunity from local taxation of unpackaged imports is an important issue which affects a tremendous number of importers and local tax officials all over the country because (a) it is a matter of everyday occurrence for goods to be imported without packaging, and (b) the conflicting state court decisions rendered in recent years place local tax officials under pressure to try to disregard and ignore the "original form" doctrine, as the courts of three states have done.

The obvious result will be continuous litigation involving this issue unless and until this Court acts with finality to resolve such issue.

CONCLUSION

For the foregoing reasons, Michelin respectfully prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted

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APPENDICES

APPENDIX A

In the Superior Court for the County of Gwinnett
State of Georgia

Michelin Tire Corporation,
Plaintiff,
vs.
Robert L. Wilson, Administrator of the Board of Tax Assessors of Gwinnett County, Georgia; Jack Bramblett, Harold Prince and John Ratcliff, as Members of the Board of Tax Assessors of Gwinnett County, Georgia; and W. L. Wages, Tax Commissioner of Gwinnett County, Georgia,
Defendants.

Civil Action
File No. 15,509

Order

Michelin Tire Corporation as plaintiff brought suit in this Court against Robert L. Wilson, Administrator of the Board of Tax Assessors of Gwinnett County, Georgia, members of the Board of Tax Assessors of said County, and W. L. Wages, Tax Commissioner of Gwinnett County, Georgia, seeking to enjoin the collection of certain ad valorem taxes which had been levied by said authorities against certain automobile tires and tubes as a part of the inventory of plaintiff.

Plaintiff contends that said automobile tires and tubes are exempt from any ad valorem tax by virtue of Article I, Section 10, Clause 2 of the Constitution of the United States, the Import Clause, which provides in part:

"No State shall, without the consent of Congress, lay any Imports or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws."

Said matter came on to be heard before this Court without a jury, and after hearing evidence thereon and argument of counsel, judgment was reserved until the transcript might be completed and filed and briefs from counsel considered by the Court.

Both sides filed exhaustive briefs which have been carefully studied by the Court and which have been of great assistance to the Court.

From the evidence produced on the hearing, the Court finds as a matter of fact:

That plaintiff, Michelin Tire Corporation, is a domestic corporation organized and existing under the laws of the State of New York, authorized to and transacting business in Gwinnett County, Georgia.

Michelin Tire Corporation is engaged in the business of importing from abroad automobile and truck tires and tubes manufactured outside the United States by a foreign corporation, Michelin Tires, Ltd., for the purpose of selling and distributing said tires and tubes through franchised tire dealers.

Michelin Tire Corporation operates a distribution warehouse located in Gwinnett County, Georgia; all tires and tubes which come into said warehouse are imported by Michelin from factories outside the United States and import duty is paid on said tires and tubes upon their entry into this Country (with one exception when tubes were purchased in this Country when imports were scarce).

Such tubes as are imported are packed in cases which in turn contain individual cartons of tubes; the automobile and truck tires are imported in bulk and are not packaged in any way and are received at plaintiff's warehouse in Gwinnett County

from public conveyances, from which they are removed, separated by size and placed in plaintiff's warehouse.

Said tires and tubes are sold by plaintiff only to its authorized dealers.

The Supreme Court in the case of *Brown v. Maryland*, held:

"It is generally sufficient for the present to say that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; *but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.*" (*Brown v. Maryland* (1827), 25 U.S. (12 Wheat) 419, 6 L.Ed. 678).

The immunity of imported goods from local taxation includes immunity from local ad valorem property taxes; *Hooven and Allison Company v. Evatt*, 324 U.S. 652; *Low v. Austin*, 80 U.S. 29.

In Corpus Juris Secundum, at 15 CJS, beginning at page 763, Section 105, is found the following language:

"A State cannot impose a tax on goods transferred into the State until they lose their character as imports and have become intermingled with the common mass of property in the State." (Page 763)

"As long as goods from a foreign country remains the property of the importer, in the original *form* or package in which imported they retain their character as imports." (Page 764)

"The mere offering of the goods for sale does not subject them to taxation by the State." (Page 765)

> "The property need not necessarily be imported in packages to be immune from State taxation if it retains its original form." (Page 765)

The automobile and truck tires here involved while perhaps not in an original package are without doubt in the original form in which they were imported into this Country. Most tubes are in the original containers. Those tubes taken from the original containers have been included in inventory and tax paid on them.

While it would seem that where said tires and tubes have been placed in plaintiff's general inventory for the purpose of sale to its customers, that such inventory should be taxed to the same extent as any other inventory of any other business in Gwinnett County, and the Court would so hold if supported by the law, it is clear that where the property is imported for resale it retains its import exemption from ad valorem taxes until after such sale.

See the statement found in *Florida Greenheart Corporation v. Gautier, Tax Assessor,* et al., 172 So. 2d 589, where it was stated that:

> "In most instances, the very purpose of importing is for resale. It is after the sale, where it is sold in the original form or package, that it becomes taxable by local authority."

This Court must, therefore, bow to the authorities and hold that the automobile and truck tires in plaintiff's inventory are imports and until they have been sold are not subject to any ad valorem tax that may be levied against them by Gwinnett County.

Insofar as the tubes in plaintiff's inventory are concerned, those which remain intact in their original shipping cartons are likewise exempt from ad valorem tax and those which may be

removed from the original shipping cartons and placed in plaintiff's general inventory would be subject to an ad valorem tax levied by Gwinnett County authorities. (It appears that plaintiff has paid the tax due on such tubes as have been removed from the original containers.

It Is, Therefore, Considered Ordered and Adjudged that as prayed by plaintiff, the defendants are temporarily and permanently restrained from attempting to assess and collect additional taxes claimed to be due from plaintiff for the years 1972 and 1973; from issuing or causing to be issued against plaintiff any fi fa for the amount of such additional taxes; and from causing to be levied upon plaintiff's property any fi fa which might be issued;

That the assessments and valuations placed upon plaintiff's exempt merchandise inventory in the NOD Returns attached to plaintiff's complaint as Exhibits H and I, respectively, are null and void and of no force and effect; and

That the NOD Tax Bills attached to plaintiff's complaint as Exhibits J and K, respectively, are null and void and of no force and effect; and

Plaintiff is relieved from the payment of the additional taxes sought to be collected by the defendant Commissioners.

And It Is So Ordered, this 14th day of June, 1974.

/s/ CHAS. C. PITTARD
Judge
Gwinnett Superior Court

APPENDIX B

In the Supreme Court of Georgia Decided: Feb. 4, 1975

Wages, Comr., et al. v. Michelin Tire Corp.

29171. (516 to 6)

Gunter, Justice.

This appeal involves a complicated federal constitutional question. Gwinnett County, Georgia assessed an ad valorem tax against Michelin's inventory held in its warehouse on January 1, 1972, and January 1, 1973. Michelin contended that the imposition of the tax by the county violated Article I, Section 10, Clause 2 of the Federal Constitution, which states in part: "No state shall, without the consent of the Congress, lay any imposts or duties on any imports or exports, except what may be absolutely necessary for executing its inspection laws. . . ." Ga. Code Ann. Sec. 1-135. The trial court agreed with Michelin, declared the assessments void, and permanently enjoined the county's tax commissioner form collecting the tax. The appellants have come here seeking reversal.

Michelin Tire Corporation is a New York corporation qualified to do business in Georgia. It is an importer and wholesaler of automobile and truck tires and tubes. It operates a distribution warehouse in Gwinnett County, Georgia, and the inventory at the warehouse consists primarily of tires and tubes imported from foreign countries, although on both tax dates in question some domestic tubes were stored at the warehouse. Michelin pays a four percent import duty on all of its imports.

Imported tires and tubes are shipped to the warehouse by two methods of transportation. Some are delivered in over-the-road trailers, and the trailers are packed and sealed at the foreign factory and are delivered by common carrier directly to the warehouse. The remainder are transported in sea vans, which are basically over-the-road trailers with removable wheels. The vans are packed and sealed at the foreign factory; they are hauled to a port where the wheels are removed; they are transported by ship to a port of entry, where they are loaded off the ship and wheels are replaced; and they are transported to the warehouse. The vans usually arrive at the warehouse within a week of arrival at the port of entry. Michelin does not own any of the trailers or vans, and there is no intermediate distribution point on any of the shipments.

Imported tires are packed into the vans and trailers in bulk, without any packaging or bundling. Each tire is distinguishable by a serial number. Upon arrival at the warehouse, each trailer or van load is unloaded and sorted so that the individual shipments are no longer separate identifiable units. The tires are stacked on wooden pallets and stored in the warehouse, segregated by size and style, awaiting sale to retail dealers. The individual tires are not treated or altered in any manner.

Imported tubes are individually packaged in small boxes, and the boxes are transported in corrugated cartons measuring sixteen inches by twenty inches by twenty-four inches. The shipments of tubes are sorted upon arrival at the warehouse and cease to be separately identifiable units. The cartons of tubes are stored, segregated by size, in an area of the warehouse called the "full case" area. When it becomes necessary to open a carton, it is removed to an area called the "shelf area," where the individually boxed tubes are placed on shelves and held available for sale in small quantities. Michelin concedes that the tubes in the shelf area are taxable.

Domestic tubes are similarly packaged and similarly handled at the warehouse. Unopened cartons are stored in the full case area but apart from the foreign cartons. Open cartons are removed to the shelf area.

All the tires and tubes in the Gwinnett warehouse are sold to franchised Michelin dealers in six southeastern states. There are 250 to 300 such dealers who submit their orders, and Michelin makes delivery by common carrier or on a customer pickup basis. The orders vary in size and may be filled from any shipment from the manufacturer and from any pallet or carton, depending upon the size and styles ordered. No tires are sold directly to retail customers.

This case involves a question of first impression in Georgia, and we have examined in detail the pertinent cases of the Supreme Court of the United States as well as some of the leading cases from other states on the subject. A summary of these cases follows.

Brown v. Maryland, 25 US 419 (1827). This case, to this date, dominates every discussion of state taxation of imports. Maryland had a statute requiring all importers of goods by "bale or package" and all wholesalers of such imported goods to take out a license and pay a $50 fee. Brown was indicted for selling dry goods in the package in which they were imported without having a license. Chief Justice Marshall held that the license fee imposed on importers was equivalent to a tax on the imports. He then turned to the question of how to determine when imports lose their character as such and become taxable by the states. Maryland argued that goods ceased to be imports as soon as they enter this country, but Chief Justice Marshall rejected that argument and found the Maryland statute unconstitutional. He set the following tentative guidelines:

> The constitutional prohibition on the states to lay a duty on imports, a prohibition which a vast majority of them must

> feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable, when they do not approach each other, may yet, when the intervening colors between white and black, approach so nearly, as to perplex the understanding, as colors perplex the vision, in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Until they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution . . .
>
> This indictment is against the importer, for selling a package of dry goods, in the form in which it was imported, without a license. This state of things is changed, if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated, until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property, by the act of the importer.

This language has become the basis of the "original package doctrine" under which, in case after case, the power of the states to tax imports has been said to turn on whether the importer has physically altered the packaging of imported goods.

Lowe v. Austin, 81 US 29 (1871). California imposed an ad valorem tax on French champagne stored by the importer, pending sale, in a warehouse in the original cases in which it was imported. The court unanimously held the tax unconstitutional, saying: "The goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they have passed from the control of the importer or been broken up by him from their original cases."

May v. New Orleans, 178 US 496 (1900). May was an importer of dry goods sold in part on order and in part out of stock. The imported goods were always packaged by the foreign manufacturer in small parcels, and the parcels were packed for shipment in cartons, crates or bales. In making sales to customers, May never broke open the small parcels but sometimes broke the shipping packages in order to sell in smaller quantities. New Orleans imposed a property tax on those items held for resale and no longer in the shipping packages. The question in the case was whether the "original package" for constitutional purposes was the shipping package or the individual wrapper. The importer argued for the individual wrapper, and the City argued for the shipping package. A majority of the court (5-4) accepted the City's position and held the tax constitutional. The majority found the shipping packages to be the "original packages" within the meaning of *Brown v. Maryland, supra*.

Gulf Fisheries Company v. MacInerney, 276 US 124 (1925). This case involved the taxability of raw fish landed on U.S. shores in fishing boats. The court held that the fish lost their distinctive character as imports soon after coming ashore, when they were washed, iced, and packaged in bulk for sale to wholesalers.

Anglo-Chilean Corp. v. Alabama, 288 US 218 (1933). Alabama imposed an annual franchise tax based on the value of goods in stock. The tax was held unconstitutional as applied to an importer who was engaged in landing, storing, and selling nitrate in the manufacturer's one hundred pound bags. The original package was not an issue in the case but was assumed to be the individual one hundred pound bag.

Hooven and Allison v. Evatt, 324 US 652 (1945). Ohio assessed for state ad valorem taxes bales of hemp held by a manufacturer-importer in its factory warehouse preliminary to use in the manufacturing process. The record in the case did not show how much, if any, of the taxed inventory was necessary to meet "current operational needs" of the plant. The court expressly reserved decision as to whether inventory held for current operational needs could be taxed and held that, in general, goods imported for use in manufacturing are not taxable as long as they remain in the hands of the manufacturer-importer and in the original package. The court expressly adopted (5-4) the "original package doctrine" as the primary test in the "import for use" context.

Youngstown Sheet and Tube Co. v. Bowers and *United States Plywood Corporation v. City of Algoma*, 358 US 534 (1959). These two cases, decided together, expressly raised the issue reserved in *Hooven and Allison, supra*. Youngstown and U.S. Plywood were both importer-manufacturers. Youngstown imported iron ore and stored approximately a three month supply in ore yards adjacent to the furnaces. The daily ore needs were taken from the yards and conveyed to stock bins, from which the ores were fed into the furnaces. Ohio assessed an ad valorem tax on the ore in the ore yards. U.S. Plywood imported green lumber in bulk and wood veneers in bundles. Both the wood and the veneers were stored in yards adjacent to the plants. The wood was stacked to facilitate drying and from time to time taken to a kiln, where drying was completed. The veneers were kept

in piles, separated as to species, and remained in the original bundles until removed as needed for use in the plant. Algoma imposed an ad valorem tax on the wood and veneers. In both of these cases the court held the tax levies constitutional on the ground that the record showed that the entire inventories in question were irrevocably committed to the manufacturing process and therefore had been "used." The court found the original package doctrine inapplicable in this context. The court restated Chief Justice Marshall's test as follows:

> He held that the goods lose their character as imports when the importer (1) 'sells them', or (2) 'breaks up his packages, and travels with them as an itinerant peddler' . . . More important to the question confronting us, he also held (3) that goods brought into this country by an importer 'for his own use' and here 'used' by him are to be regarded as part of the 'common mass' of property and are not immuned from state taxation.

Although *Hooven and Allison* was distinguished on its facts, in practical effect, we conclude that it was overruled.

Department of Revenue v. James Beam Distilling Co., 377 US 341 (1964). Kentucky imposed an ad valorem tax on scotch whiskey while it was held by the importer in its warehouse in the original packages in which the whiskey was shipped. The issue in the case was whether the Twenty-First Amendment changed the import-export clause as to liquor. The court held that it did not and found the tax unconstitutional. This decision, by implication, reaffirmed (a) the original package doctrine in the context of imports for sale, and (b) the rule that ad valorem taxes fall under the constitutional prohibition.

American Mannex Corp. v. Cronvich, 207 So2d 778 (La. 1968). American imported tubular steel oil well casings. Shipments were ordered from Canadian manufacturers and shipped under bill of lading to a warehouse in Louisiana.

Upon arrival, each shipment was unloaded, sorted and stored with previous shipments. On rare occasions, shipments purchased from within the United States were stored in the same warehouse. The question was whether the original package was each entire shipment or each casing. The court held:

> We have no hesitancy in concluding, under the facts of this case, that the original packages of casings imported by the plaintiff comprised all casings covered by the bills of lading and that, when those casings or joints are stored in the warehouse and assorted with other tubing of like dimension and quality, they were co-mingled and, in reality, formed part of the retail importer's inventory, thus becoming irrevocably committed to the purpose for which they were ultimately destined, i.e., sale and disposal by plaintiff, under the ruling in the *Youngstown* case. In any case, when a portion of the shipment was sold at retail to the plaintiff's customers, all joints covered in the bill of lading, which we regard factually, as well as ficticiously, as the original package, lost their previous status as imports and became subject to local taxation.

Volkswagen Pacific, Inc. v. City of Los Angeles, 496 P2d 1237 (Calif. 1972). Volkswagen imported autos and auto parts for resale to franchise dealers. The parts were separately packaged and were transported in sea vans. The cars were imported in groups but were not packaged. The court held:

> (a) As to the parts, that removal from the sea van is not necessarily the incident that gives rise to taxability by the states, because removal from the sea vans may be necessary to permit further shipment of items to sales outlets in interior states. But where, as here, the individual items were removed from the vans for the purpose of permitting Volkswagen to make sales from the warehouse as wholesalers, then the items

have lost their immunity even though they remained in the manufacturer's packaging.

(b) As to the cars, they were taxable. Where packaging is inherently impossible or impracticable, an imported, unpackaged item loses its immunity from state or local taxation when it is removed from an aggregate of other similar unpackaged items imported as a unit with it.

E. J. Stanton and Sons v. Los Angeles County, 177 P2d 804 (Calif. App. 1947), cert. denied 322 US 766 (1947). Stanton was a wholesale and retail lumber dealer who imported raw lumber in bulk. The lumber was transported in ships without packaging and was delivered directly to the dealer's lot. There, each shipment was stored separately but was sorted and graded to facilitate eventual sale. From time to time, a given shipment would be broken either by sale of a portion or by co-mingling a portion with remnants of other shipments. Los Angeles County imposed an annual ad valorem tax on that portion of each broken shipment held by the dealer on the tax date but did not tax those shipments which remained intact. The California Court of Appeals upheld the tax. The question was whether the original package was each board or each shipment. The court held:

(a) That, for material shipped in bulk, the shipment is the package, and

(b) That such shipments become incorporated into the taxable mass of property when any part of a shipment is sold or co-mingled with other shipments held for sale.

Tri-Con, Inc. v. King County, 374 P2d 174 (Wash. 1962), cert denied 372 US 227 (1963). This case involved an ad valorem tax on the inventories of two importers of goods for resale. One imported steel products and the other imported glass products. Both held their products in the warehouse in the

original bundle, reel, crate or package until the time of resale. The question was whether *Youngstown* and *U.S. Plywood* had modified the original package doctrine with respect to goods imported for resale. The county argued that, under those cases, the imports became taxable when they became a part of the importers' current inventory of goods held for sale. The court rejected this argument and disallowed the tax.

Wilson v. County of Wake, 199 SE2d 665 (N.C. App. 1973). The county imposed an ad valorem tax on the inventory of an importer-wholesaler of undercarriage parts for crawler-type vehicles. Some parts were imported in wooden crates, some in bundles, and large ones as individual items. Upon arrival at the warehouse, the parts were sorted and stockpiled with previous shipments preliminary to sale. When it became necessary to break any package, the remains of the package were removed to a separate area of the warehouse. That such remains were taxable was admitted. On these facts, the court held the tax unconstitutional as applied to those items which remained in the condition in which they were shipped. More specifically, the court held: (a) that an entire shipment was not the original package and that the original package was not broken when one portion of a shipment was sold; and (b) that sorting and stockpiling of the components of any shipment did not cause them to lose their character as imports.

Florida Greenheart Corp. v. Gautier, 172 S2d 589 (Fla. 1965), cert denied 382 US 825 (1965). A county imposed a tangible personal property tax on inventories of lumber and pilings imported for resale. Upon arrival at the importer's yard, each shipment was sorted and stacked according to existing orders or according to type of lumber. Shipments did not remain identifiable units but were co-mingled with other similar imports held for resale. The question was whether the shipments or the individual piece of lumber was the original package. The court noted that the *Brown* test spoke of goods in the original

"form" or "package". The court held that the lumber could not be taxed until after it was sold by the importer.

Michigan State Tax Commission v. Garment Corp. of America, 189 NW2d 72 (Mich. App. 1971), cert denied 404 US 992 (1971). This case merely held that garments packaged in cartons which were shipped by sea van remained in the "original package" as long as they were in the cartons even though the cartons had been removed from the van.

Citroen Cars Corp. v. City of New York, 332 NYS2d 882 (N.Y. 1972). This case involved a franchise tax based on sales volume. Citroen imported automobiles which were delivered to a New York warehouse. The cars were sold both at wholesale and retail. Those sold at wholesale received minor preparations such as installation of a new battery, but were not cleaned and did not receive normal dealer preparation. Those sold at retail were fully cleaned and prepared and, frequently, were modified by the addition of American-made options. The court found the strict "original package" test inapplicable, and it held that the franchise tax could be applied to retail sales but not to wholesale sales. The court's reasoning turned on the commercial realities of the importers' situation, and it said:

> As with the original package doctrine a line must be drawn, sometimes arbitrarily, beyond which tax immunity will not extend (See e.g., *May Company v. New Orleans* . . .). Most important, the distinction made in this case comports with the business actualities and is economically supportable in separating imports still in the flow of international commerce from those which have come to rest, and are being treated by their owners as property at rest to be modified as they wish. . . . If the immunity were lost by the merest physical change, the immunity, at least with respect to imported automobiles would be without vitality, especially when one considers the complications

> of ocean transportation and the need for compliance with domestic automobile safety statutes.

In the case at bar the appellants argue that an annual ad valorem tax is not a tax on imports within the meaning of the federal constitutional provision. We reject this argument on the basis of the above-cited authority.

The appellants also argue that the "original package" is the sea van so that the imports lose their character as such when removed from the van. We likewise reject this argument. Sea vans are a normal means of transportation available through common carriers. To make the act of unloading the imports from the carrier a "breaking of the original package" is to make it impossible for importers who use that means of transportation to maintain the character of the goods as imports after the goods are in this country.

Appellants' third argument is that imports lose their character as such when sorted and co-mingled with other shipments preliminary to sale. As we read *Brown v. Maryland, supra*, it establishes a "two-hat" approach to importers for resale. Such importers are free to deal with their goods as imports after the goods are in this country; and, if they do so, the goods remain immune from state taxation. When, however, the importer deals with his goods as a seller, he becomes Chief Justice Marshall's "itinerant peddler"; and the goods become subject to state taxation. The original package doctrine is not a mechanical, universally applicable test; it is, instead, a useful means in many cases of determining which hat the importer-seller is wearing, because frequently the act of breaking the original package is preliminary to converting the imports to salable units.

In the case at bar the entire Michelin tire inventory was unpackaged, and all shipments in the inventory were co-mingled and stored by size and type to make the individual units im-

mediately available for resale. We therefore hold that the tires, imported in bulk without packaging, which have been sorted, segregated by size and style, and co-mingled with other shipments have lost their status as "imports" and are subject to taxation.

However, packaged imports, the tubes in the corrugated cartons in this case, are not subject to taxation under the "original package" doctrine. This doctrine has been almost universally applied, in a mechanical way, for about 150 years. The great weight of authority makes a vast distinction between goods shipped in packaging, such as crates or cartons, and goods shipped in bulk. Packaged imports retain their status as imports, and are not subject to taxation. Bulk imports that have been mingled with other bulk imports, sorted, and arranged for sale do not retain their status as imports, and they are subject to taxation.

What we do in this case is to merely "draw a line", and it is, admittedly, a difficult line to draw.

Judgment affirmed in part and reversed in part. All the Justices concur, except Hill, J., disqualified.

APPENDIX C

Clerk's Office, Supreme Court of Georgia

Atlanta 2/18/75

Dear Sir:

The motion for a rehearing was denied today: Case No. 29171, Wages, Comr., et al. v. Michelin Tire Corp.

Hill, J., disqualified.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

Supreme Court, U. S.
FILED
JUL 23 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

PETITION FOR CERTIORARI FILED MAY 7, 1975

CERTIORARI GRANTED JUNE 23, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

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CHRONOLOGICAL LIST OF IMPORTANT DATES ON WHICH PLEADINGS WERE FILED, HEARINGS HELD AND ORDERS ENTERED

1973

Dec. 10 Plaintiff's Complaint filed in Superior Court of Gwinnett County, Georgia.

1974

Jan. 8 Defendants' Answer filed in Superior Court of Gwinnett County, Georgia.

Apr. 9 First Amendment to Plaintiff's Complaint filed in Superior Court of Gwinnett County, Georgia.

Apr. 9 Case tried, without a jury, in Superior Court of Gwinnett County, Georgia.

June 14 Opinion and judgment rendered by Superior Court of Gwinnett County, Georgia.

1975

Feb. 4 Opinion and judgment rendered by Supreme Court of Georgia.

Feb. 18 Michelin's Motion for Rehearing denied by Supreme Court of Georgia.

In the Superior Court of Gwinnett County
State of Georgia

Michelin Tire Corporation, Plaintiff, v. Robert L. Wilson, Administrator of the Board of Tax Assessors of Gwinnett County, Georgia; Jack Bramblett, Harold Prince and John Ratcliff, as Members of the Board of Tax Assessors of Gwinnett County, Georgia; and W. L. Wages, Tax Commissioner of Gwinnett County, Georgia, Defendants.	Civil Action. No. 15,509.

COMPLAINT

(Filed December 10, 1973)

The Complaint of Michelin Tire Corporation against Robert L. Wilson, Administrator of the Board of Tax Assessors of Gwinnett County, Georgia; Jack Bramblett, Harold Prince and John Ratcliff, as Members of the Board of Tax Assessors of Gwinnett County, Georgia; and W. L. Wages, Tax Commissioner of Gwinnett County, Georgia, respectfully shows:

1

Plaintiff is a corporation organized and existing under the laws of the State of New York with its principal place of busi-

ness in Lake Success, New York, and is authorized to and transacting business in Gwinnett County, Georgia.

2

The defendants herein named are: Robert L. Wilson, Administrator of the Board of Tax Assessors of Gwinnett County, Georgia (hereinafter defendant Wilson); Jack Bramblett, Harold Prince and John Ratcliff, as Members of the Board of Tax Assessors of Gwinnett County, Georgia (hereinafter defendant Assessors), all of whom may be served at the Tax Assessor's office in the Gwinnett County Courthouse in Lawrenceville, Georgia, and W. L. Wages, Tax Commissioner of Gwinnett County, Georgia (hereinafter defendant Commissioner), who may be served at his office in the Gwinnett County Courthouse in Lawrenceville, Georgia, and all of said defendants are subject to the jurisdiction of this Court.

3

Plaintiff is engaged in the business of importing into the United States automobile and truck tires and tubes manufactured outside of the United States and distributing such tires and tubes through franchised tire dealers.

4

As a part of such business, plaintiff operates a distribution warehouse located in Gwinnett County, Georgia. Tires and tubes imported by the plaintiff flow into such warehouse from the factories outside the United States at which such tires and tubes are manufactured and subsequently flow out from the Gwinnett County warehouse to destinations scattered throughout six (6) southeastern states.

5

On or about October 1, 1973, and based on NOD personal property tax returns made by defendant Wilson in plaintiff's name, defendant Commissioner billed plaintiff for additional Gwinnett County personal property taxes in the amount of $9,580.06 for 1972 and $11,208.96 for 1973. Copies of such bills are attached hereto as Exhibits J and K and expressly incorporated herein by reference.

6

All of the additional taxes claimed in the tax bills described in Paragraph 5 above were assessed on the inventory of imported tires and tubes owned by plaintiff and located in the plaintiff's warehouse in Gwinnett County on January 1, 1972 and January 1, 1973, respectively.

7

All of the tires and tubes located in the plaintiff's Gwinnett County warehouse on January 1, 1972 and January 1, 1973 were tires and tubes which plaintiff imported from outside the United States, and all of such imported tires and tubes were owned by plaintiff and were stored temporarily by plaintiff in such Gwinnett County warehouse pending distribution thereof to destinations scattered throughout six (6) southeastern states as hereinabove set forth.

8

All of the tires in the plaintiff's Gwinnett County warehouse on January 1, 1972 and on January 1, 1973 were tires which were imported in bulk, without packaging, and all of such tires were still in the exact same form and shape in which such tires were imported.

9

With the exception of certain passenger tubes which plaintiff had removed from the original shipping cartons (hereinafter referred to in Paragraph 35), all of the tubes located in plaintiff's Gwinnett County warehouse on January 1, 1972 and January 1, 1973 were still in the original packages in which such tubes were imported.

10

Except as otherwise shown in Paragraph 38 below, the additional taxes claimed in the bills referred to in Paragraph 5 are prohibited by the Import Clause (Article I, Section 10, Clause 2) of the Constitution of the United States, which provides in part:

> "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws . . ."

11

By reason of these facts, and except as otherwise noted in Paragraphs 36 and 37 below, all of the tires and tubes located in the plaintiff's Gwinnett County warehouse on January 1, 1972 and January 1, 1973 were and are immune, under the Import Clause of the United States Constitution referred to in the preceding paragraph, from the imposition of personal property taxes by Gwinnett County, and the actions of the defendants set forth below are null and void and of no legal force and effect.

12

On or about March 28, 1972, plaintiff filed with the Personal Property Branch of the Board of Tax Assessors of Gwinnett County, Georgia, its Statement of Business Assets (Personal Property Tax Return) for the year 1972. A copy of said Statement is attached hereto as Exhibit A and expressly incorporated herein by reference.

13

As more fully shown in the copy of the Statement of Business Assets attached hereto as Exhibit A, plaintiff claimed that certain merchandise inventory located in its warehouse in Gwinnett County on January 1, 1972, having an approximate value of $744,961.00 was exempt from taxation because it was merchandise imported from a foreign country.

14

The merchandise inventory claimed by the plaintiff to be exempt consisted of the imported tires and tubes hereinabove described and plaintiff's claim of exemption was based upon the constitutional provision hereinabove set forth.

15

Plaintiff did not receive the notice required by Ga. Code §92-6911 (Acts 1937, pp. 517, 519) of any correction or change made by the defendant Assessors in the return filed by plaintiff and did not know that its return had been changed by the defendant Assessors until it received 1972 Gwinnett County Tax Bill No. 24559 from the defendant Commissioner.

16

As more fully shown on the copy of Gwinnett County Tax Bill No. 24559 attached hereto as Exhibit B and expressly incorporated herein by reference, the net taxable valuation placed upon plaintiff's property by the defendant Assessors was $308,-200.00 and included the sum of $297,980.00 as the assessed

value of the inventory of imported tires and tubes claimed to be exempt in plaintiff's original 1972 return, said amount representing 40% of the total value of the merchandise inventory of $744,961.00.

17

As a result of the defendant Assessors including the inventory of imported tires and tubes as a part of plaintiff's taxable property, the original Gwinnett County Tax Bill No. 24559 claimed total taxes due from plaintiff in the sum of $9,908.83.

18

Upon receipt of said original Gwinnett County Tax Bill No. 24559, counsel for plaintiff immediately contacted the defendant Commissioner concerning the taxability of the inventory of imported tires and tubes claimed to be exempt in plaintiff's original return, and the original Gwinnett County Tax Bill No. 24559 was subsequently amended to release from taxation the $297,980.00 assessment which the defendant Assessors included therein as the value of the inventory of imported tires and tubes. A copy of said amended tax bill is attached hereto as Exhibit C and expressly incorporated herein by reference.

19

On or about November 11, 1972, the defendant Commissioner forwarded to plaintiff a corrected statement of the taxes owed by plaintiff for the year 1972 under Gwinnett County Tax Bill No. 24559. A copy of said corrected statement is attached hereto as Exhibit D and expressly incorporated herein by reference.

20

Thereafter, plaintiff paid to the defendant Commissioner the sum of $328.58 as the total tax due for the year 1972, and Tax Bill No. 24559 was marked "paid" on the Tax Digest of Gwinnett County, Georgia.

21

On or about February 26, 1973, plaintiff filed with the Personal Property Branch of the Board of Tax Assessors of Gwinnett County, Georgia, its Statement of Business Assets (Personal Property Tax Return) for the year 1973. A copy of said Statement is attached hereto as Exhibit E and expressly incorporated herein by reference.

22

As more fully shown on the copy of the Statement of Business Assets attached hereto as Exhibit E, plaintiff claimed that certain merchandise inventory located in its warehouse on January 1, 1973, having an approximate value of $834,000.00 was exempt from taxation because it was merchandise imported from a foreign country.

23

The merchandise inventory claimed by the plaintiff to be exempt in its 1973 return consisted of a quantity of the imported tires and tubes hereinabove described, and plaintiff's claim of exemption was based upon the constitutional provision hereinabove set forth.

24

The 1973 Return filed by plaintiff as aforesaid was accepted by the defendant Assessors and the defendant Commissioner

subsequently issued Gwinnett County Tax Bill No. 27254 showing total taxes in the sum of $290.08 to be due from the plaintiff for the year 1973. A copy of said Tax Bill No. 27254 is attached hereto as Exhibit F and expressly incorporated herein by reference.

25

Plaintiff did not receive the notice required by Ga. Code § 92-6911(a), as amended (Acts 1937, pp. 517, 519; 1970, pp. 580, 581; 1971, p. 33; 1972, pp. 1114, 1118), of any corrections or changes made by the defendant Assessors in the return filed by the plaintiff for 1973 and had no knowledge that its 1973 return was being considered by the defendant Assessors until it received a letter dated August 24, 1973, from defendant Wilson requesting a meeting with representatives of plaintiff for the purpose of discussing the validity of the inventory exemption claimed by the plaintiff in its 1973 return. A copy of said letter is attached hereto as Exhibit G and expressly incorporated herein by reference.

26

Pursuant to the request contained in the letter attached hereto as Exhibit G, counsel for plaintiff met with Mr. Wilson on September 25, 1973, and were subsequently advised by Mr. Wilson on September 27, 1973 that Gwinnett County had decided to proceed with efforts to collect the tax it claimed to be due on plaintiff's inventory of imported tires and tubes for the year 1973, as well as the year 1972.

27

Pursuant to said decision and on September 27, 1973, defendant Wilson caused to be prepared and filed in the name of Michelin Tire Corporation NOD Tax Returns for the years

1972 and 1973, respectively. Copies of said NOD Returns are attached hereto as Exhibits H and I, respectively, and are expressly incorporated herein by reference.

28

As more fully shown by said NOD Returns, the inventory of imported tires and tubes claimed to be exempt from taxation in plaintiff's 1972 and 1973 returns was returned by defendant Wilson as taxable property, and its net taxable value assessed at $297,980.00 for 1972 and $333,600.00 for 1973.

29

The NOD returns hereinabove described were filed by the defendant Wilson without the knowledge or consent of plaintiff, and plaintiff has at no time authorized or ratified the filing of either of said returns.

30

Plaintiff has paid the $290.08 total tax shown to be due in the original 1973 Gwinnett County Tax Bill No. 27254 but has not paid the additional tax alleged to be due for the years 1972 and 1973 in the NOD Tax Bills attached hereto as Exhibits J and K.

31

By reason of these facts and with the exception of the particular items of merchandise inventory hereinafter admitted to be taxable in Paragraph 38, the actions of the defendant Assessors and the defendant Wilson as hereinabove alleged are null and void and of no legal force and effect, and said defendants, together with the defendant Commissioner, should be temporarily and permanently restrained and enjoined from assessing or attempting to collect the additional taxes alleged to be due from plaintiff on its merchandise inventory for the years 1972 and 1973.

32

By reason of the failure of the defendant Assessors to comply with the notice requirements of Ga. Code § 92-6911 (Acts 1937, pp. 517, 519) prior to changing plaintiff's 1972 return, and their failure to comply with the notice provisions of the same code section, as amended by Acts 1972, pp. 1114, 1118, before changing plaintiff's 1973 return, plaintiff has no adequate remedy at law and is entitled to an injunction to restrain the defendants from attempting to assess and collect the wholly illegal additional taxes claimed to be due from the plaintiff for the years 1972 and 1973.

33

Defendant Wilson has informed plaintiff's counsel that unless the additional taxes claimed to be due from the plaintiff for the years 1972 and 1973 are paid on or before November 20, 1973, defendants will cause a fi.fa. to be issued for the amount of such additional tax and will thereafter attempt to collect such additional tax by causing said fi.fa. to be levied upon plaintiff's warehouse facility located in Gwinnett County, Georgia.

34

The issuance and levy of a fi.fa. by the defendants as aforesaid will cause irreparable injury and damage to the plaintiff, and plaintiff is entitled to an injunction to restrain such conduct without awaiting the actual issuance and levy of a tax execution by the defendants.

35

In October, 1973, plaintiff learned that certain passenger tubes which it had claimed to be exempt in the returns attached hereto as Exhibits A and E, respectively, were not in fact exempt from local taxation because plaintiff had removed said tubes from the original shipping cartons.

36

On January 1, 1972, non-exempt passenger tubes having a value of $633.92 were owned by plaintiff and located in its warehouse in Gwinnett County, Georgia.

37

On January 1, 1973, non-exempt passenger tubes having a value of $664.22 were owned by plaintiff and located in its warehouse in Gwinnett County, Georgia.

38

Such non-exempt passenger tubes were and are taxable by Gwinnett County, Georgia, and total taxes in the sum of $8.03 for the year 1972 and the sum of $8.73 for the year 1973 are owed by plaintiff.

39

Prior to the filing of this Complaint, plaintiff has paid to defendant Commissioner the taxes admitted to be due for the years 1972 and 1973 on said non-exempt passenger tubes.

Wherefore, plaintiff prays:

(a) that summons issue requiring the defendants to appear and answer this Complaint as provided by law;

(b) that the defendants be temporarily restrained from attempting to assess and collect the additional taxes claimed to be due from plaintiff for the years 1972 and 1973; from issuing or causing to be issued against plaintiff any fi.fa. for the amount of such additional taxes; and from causing to be levied upon plaintiff's property any fi.fa. which might issue;

(c) that, after hearing, the defendants be permanently restrained and enjoined from attempting to assess and collect the

additional taxes claimed to be due from plaintiff for the years 1972 and 1973; from issuing or causing to be issued against the plaintiff any fi.fa. for the amount of such additional taxes; and from causing to be levied upon plaintiff's property any fi.fa. which might issue;

(d) that the Court declare the assessments and valuations placed on plaintiff's exempt merchandise inventory in the NOD Returns attached to the plaintiff's Complaint as Exhibits H and I, respectively, null and void and of no force and effect;

(e) that the Court declare the NOD Tax Bills attached to the plaintiff's Complaint as Exhibits J and K, respectively, null and void and of no force and effect, and relieve the plaintiff from the payment of the additional taxes sought to be collected by the defendant Commissioner; and

(f) that the plaintiff have such other and further relief as may be meet and proper in the premises.

JONES, BIRD & HOWELL

By: /s/ EARLE B. MAY, JR.

4th Floor Haas-Howell Building
Atlanta, Georgia 30303
522-2508

WEBB, FOWLER & TANNER

By: /s/ W. HOWARD FOWLER

234 Luckie Street, S. W.
Lawrenceville, Georgia 30245
963-3423

Attorneys for Plaintiff

State of Georgia
County of Gwinnett

Personally appeared before the undersigned officer, duly authorized to administer oaths in this state, Robert E. Stone who, after first being duly sworn, deposes and says on oath that he is Branch Operations Manager of Michelin Tire Corporation and as such is authorized to make this Affidavit, and that he has read the above and foregoing Complaint, and that the facts stated therein are true and correct.

/s/ ROBERT E. STONE

(Jurat and Exhibits A through K omitted in printing.)

In the Superior Court for the County of Gwinnett
State of Georgia

(Title omitted in printing)

ANSWER OF DEFENDANTS

(Filed January 8, 1974)

Now come the defendants in the above-styled cause and files this their answer to plaintiff's complaint as follows:

1

Defendants neither admit nor deny plaintiff's allegation as to where organized and where its principal place of business is located for want of sufficient information, but do admit that plaintiff is transacting business in Gwinnett County, Georgia.

2

Defendants admit Paragraph Two (2) of plaintiff's complaint.

3

Defendants neither admit nor deny the allegations contained in Paragraph Three (3) of plaintiff's complaint for want of sufficient information as to where the tires and tubes distributed by the plaintiff are manufactured.

4

Defendants neither admit nor deny the allegations of Paragraph Four (4) of plaintiff's complaint for want of sufficient information.

5

Defendants admit all of Paragraph Five (5) of plaintiff's complaint with the exception of the allegation that plaintiff was billed for additional personal property taxes in that said bills were for personal property tax owed by the plaintiff and did not represent bills for taxes in addition to that which the plaintiff was required by law to pay.

6

Defendants deny Paragraph Six (6) of plaintiff's complaint and in further answer aver that the taxes imposed were not additional taxes but taxes plaintiff was required by law to pay. Defendants further aver that the tires were stacked in racks in plaintiff's warehouse and were not in containers or original cartons so a determination could be made as to whether said goods were in fact import goods.

7

Defendants neither admit nor deny Paragraph Seven (7) of plaintiff's complaint for want of sufficient information and in further answer aver that an examination of the tires which were stacked in open racks and were not in containers did not reveal whether said tires were produced domestically within the Continental United States or were in fact goods imported from a foreign country.

8

Defendants deny Paragraph Eight (8) of plaintiff's complaint and in further answer aver that an examination of the tires did not reveal the method by which they were imported if said tires were in fact imported from a foreign country, and that said tires were not at the time of their inspection by the defendants or their agents packaged in any kind of container. However, defendants have been furnished information which lead them to believe that all or some of the tires were enclosed in seagoing containers which were their original package or container and that said seagoing containers were not opened until their arrival at the plaintiff's warehouse in Gwinnett County, at which time the original package or container was then opened, the tires were removed and placed on open racks in the warehouse. Defendants further aver that the tires were not imported in bulk but were in fact packaged in large seagoing containers.

9

Defendants neither admit nor deny Paragraph Nine (9) of plaintiff's complaint for want of sufficient information.

10

Defendants deny Paragraphs Ten (10) and Eleven (11) of plaintiff's complaint.

11

Defendants admit Paragraphs Twelve (12) and Thirteen (13) of plaintiff's complaint.

12

Defendants neither admit nor deny Paragraph Fourteen (14) of plaintiff's complaint for want of sufficient information.

13

Defendants deny Paragraph Fifteen (15) of plaintiff's complaint and in further answer aver that there was no change by the tax assessors in the return filed by the plaintiff and the assessment was based on the plaintiff's tax return. However, defendants did not agree with plaintiff's contention that a portion of its property would be exempt from State and County taxes.

14

Defendants admit Paragraphs Sixteen (16), Seventeen (17), Eighteen (18), Nineteen (19), Twenty (20), Twenty-One (21), Twenty-Two (22), Twenty-Three (23), and Twenty-Four (24) of plaintiff's complaint.

15

Defendants deny Paragraph Twenty-Five (25) of plaintiff's complaint and in further answer aver that no notice was required due to the fact that the assessment made by the tax assessors for 1973 was based on the information contained in the return of the plaintiff. No changes or corrections in said return were made. However, defendants did, in fact, disallow, after review and investigation, the exemption as claimed by the plaintiff.

16

Defendants admit Paragraphs Twenty-Six (26), Twenty-Seven (27) and Twenty-Eight (28) of plaintiff's complaint.

17

Defendants deny Paragraph Twenty-Nine (29) of plaintiff's complaint and in further answer aver that the plaintiff was advised that the exemption had been disallowed and that Gwinnett County would proceed with steps necessary to collect the balance of the tax due for 1972 and 1973.

18

Defendants admit Paragraph Thirty (30) of plaintiff's complaint.

19

Defendants deny Paragraphs Thirty-One (31) and Thirty-Two (32) of plaintiff's complaint.

20

Defendants admit Paragraph Thirty-Three (33) of plaintiff's complaint.

21

Defendants deny Paragraph Thirty-Four (34) of plaintiff's complaint.

22

Defendants admit Paragraph Thirty-Five (35) of plaintiff's complaint.

23

Defendants neither admit nor deny Paragraphs Thirty-Six (36), Thirty-Seven (37) and Thirty-Eight (38) of plaintiff's complaint for want of sufficient information.

24

Defendants admit Paragraph Thirty-Nine (39) of plaintiff's complaint.

Wherefore, having fully answered plaintiff's complaint, defendants pray that the same be dismissed with costs on the plaintiff.

STARK, STARK & HENDERSON

By: /s/ HOMER M. STARK
Attorneys for Defendants

P. O. Box 8
Lawrenceville, Georgia 30245
963-3072

Georgia
Gwinnett County

Personally appeared before the undersigned attesting officer, duly authorized by law to administer oaths in the State of Georgia, Robert L. Wilson, who being duly sworn, deposes and says on oath that he is tax assessor of Gwinnett County, Georgia, and that the facts set forth in the within and foregoing answer are true and correct.

/s/ ROBERT L. WILSON

(Jurat and certificate of service omitted in printing.)

In the Superior Court of Gwinnett County
State of Georgia

(Title omitted in printing)

FIRST AMENDMENT TO PLAINTIFF'S COMPLAINT

(Filed April 9, 1974)

Now comes Michelin Tire Corporation and, pursuant to the provisions of *Ga. Code* § 81A-115, files this its first amendment to its original complaint as follows:

1

By inserting in said original complaint immediately prior to the prayers the following paragraphs numbered 40 through 44 inclusive, to-wit:

"40

On April 8, 1974, plaintiff learned for the first time that other tubes which it had claimed to be exempt in the returns attached hereto as Exhibits A and E, respectively, were not in fact exempt from local taxation because said tubes were domestic tubes which plaintiff had not imported into the United States.

41

On January 1, 1972, non-exempt domestic tubes having a value of $9,859.76 were owned by plaintiff and located in its warehouse in Gwinnett County, Georgia.

42

On January 1, 1973, non-exempt domestic tubes having a value of $6,392.36 were owned by plaintiff and located in its warehouse in Gwinnett County, Georgia.

43

Such non-exempt domestic tubes were and are taxable by Gwinnett County, Georgia and total taxes in the sum of $126.67 for the year 1972 and the sum of $86.02 for the year 1973 are estimated to be owed by plaintiff on said non-exempt domestic tubes.

44

Simultaneously with the filing of this amendment, plaintiff is paying to the defendant Commission the taxes estimated to be due for the years 1972 and 1973 on said non-exempt domestic tubes."

Wherefore, plaintiff prays that this its first amendment to its original complaint be ordered filed.

JONES, BIRD & HOWELL
By: /s/ EARLE B. MAY, JR.

4th Floor Haas-Howell Building
Atlanta, Georgia 30303
522-2508

WEBB, FOWLER & TANNER
By /s/ W. HOWARD FOWLER

234 Luckie Street, S. W.
Lawrenceville, Georgia 30245
963-3423

(Certificate of service omitted in printing)

In the Superior Court of Gwinnett County, Georgia

(Title Omitted in Printing)

Before:

The Honorable Charles C. Pittard
Judge of the Superior Court
Presiding Without a Jury

The Honorable Earl B. May, Jr.
Attorney at Law
Representing the Plaintiff

The Honorable Homer Stark
Attorney at Law, Lawrenceville, Georgia
Representing the Defendant

Reported by:

Richard A. Upton
Official Court Reporter for the Gwinnett
Judicial Circuit

TRANSCRIPT OF THE EVIDENCE

[Tr. 1*] Mr. May: My name is Earl May and Edward R. Cain of my firm in Atlanta and Mr. Fowler is associated with us in this case. First thing that I would like to do is tend an amendment—uh—and ask that it be filed in open court—uh—I served it on Mr. Stark this morning and it has been caused by a discovery which we made only yesterday, your Honor, that we did owe a few more—uh—dollars in taxes on some tubes that we do not contend were imported and we didn't realize it until yes-

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* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

terday and we have tendered to Mr. Wilson, as the administrator, —uh—a check in payment of those taxes committed to be due in that amendment. I don't believe Mr. Stark has any objections.

Mr. Stark: No, sir.

The Court: Ordered filed.

Mr. May: Thank you, your honor. Now we have submitted a—uh—a trial brief to the court and I don't know whether the courts have had an opportunity to review that or—uh—whether you prefer for me to outline the case at this point or just how you wish us to proceed.

The Court: I have read your brief. I haven't had a chance to study it yet, sir. I suggest that you follow whatever procedure you wish to, Mr. May.

Mr. May: Alright, sir. Well, briefly—uh—this is a suit brought by Michelin Tire Corp.——

The Court: Well, the gist of your point is that any articles imported into this state are not taxable, so long as they remain in the original container in which **[Tr. 2]** they are imported into this country until they reach their final retailer, is that not so?

Mr. May: Well, that, that, yes, sir, that's part of it and there's a little bit more to it besides that, your honor. Basically——

The Court: You can go ahead and state it then.

Mr. May: Basically the, the complaint is that imported goods, imported by Michelin into Gwinnett County, are not subject to advalorem taxes by Gwinnett County—uh—due to the import cost of the federal constitution and we take the position that goods imported in packaging are not subject to taxation so long as they remain in their original package, but with respect to products that are imported in bulk without packaging such as automobile tires, which the evidence will show are imported without any packaging—uh—then those items so long as they are in the same form and shape in which they were imported

into this country and are still in the flow of distribution—uh—that they likewise are not subject to taxation. We have two different situations, Judge, is what I'm trying to say. Some of the imports do come in a package.

The Court: Well, I agree and I can make distinction of the court and I had forgotten that contention, as you say, yes, sir, the same contention is still until the imported goods reach the retailer. I think that they are not taxable to advarolem taxes. They are taxed by his inventory, but not in the wholesalers inventory or the distributors inventory.

[Tr. 3] Mr. May: Yes, sir, that is, is a part of our case and we, we call that still being in the fore of the import distribution, is what we call it. Your honor, at some point an import comes to rest and by illustration—if I got a set of Michelin tires on my automobile I can't go to the DeKalb County Tax Assessors and say you can't tax those because it's an import. Obviously, it's no longer an import at that point and time.

The Court: How about the man you bought them from? Can he raise the some?

Mr. May: I think it depends on what his relationship is, whether he's selling it retail or whether he is a distributor and the evidence in this case will show that at the Gwinnett County warehouse what Michelin does is—is import tires and tubes manufactured at factories outside the United States and distribute them through six southeastern states to franchise dealers and—uh—that is basically what—what the evidence will show in that respect. But if I might point out to you, your honor, there are very few facts here that are in dispute, the pleadings—uh—in the case or most of the allegations have been admitted and I don't know whether to take the court's time to read all these allegations and—and tell you what has and has not been admitted—uh—but I'll be glad to go over that if the court would like for me to. I think basically the only issue, and Mr. Stark can correct me if I'm wrong, is whether or not these

imported goods are in fact—uh—subject to advalorem taxes. **[Tr. 4]** Mr. Stark: Your honor, we——

The Court: As long as they remain in the—the hands of the——

Mr. May: ——of the importer——

The Court: ——importer.

Mr. May: Yes, sir, that's right.

Mr. Stark: Well, your honor, there's of course questions that we don't know the answer to—uh—when the tax assessors looked into the situation we found the tires, of course that were distributed in the warehouse as the other tires stacked on the shelf and we began to research the matter some and inquire of other counties as to what they were doing and I contacted the Attorney General to find out what advice they could give since it does involve state tax—uh—Clayton County has a similar warehouse—uh—Their attorney was somewhat interested in the situation because it involves taxes in Gwinnett and also Clayton County. Substantial matters, I think this would be somewhat about $10,000 depending on whether this exemption is allowed and researched the Georgia decision and there's no cases in Georgia relating to this point. So you have quite a sum of money involved relating to this—uh—exemption—uh—of course substantial amounts over a period of time. And so without any direct authority we took the position that finding the tires on the shelves as we did, that apparently ready for sale that they were subject to county taxes.

The Court: He'll be able to answer your question, I presume. But does it make any difference to—you say your tires are shipped in bulk——

[Tr. 5] Mr. May: We have evidence that proves that, Your Honor.

The Court: When they are shipped in bulk, are they segregated in the warehouse after they reach Michelin place in Gwinnett County or, are they intermingled with the other stock or merchandise of tires that he already has, or——

Mr. May: Well, the evidence will show, Your Honor.

The Court: Then we come to the point that they're still within the process of being imported.

Mr. May: Well, with respect to tires, the evidence will show that—that—or, and never have been any tires except imported tires in the warehouse—uh—and they are removed from the vehicle in which they are transported to the warehouse and segregated by sizes and stacked until they are distributed to the six southeastern states.

The Court: Why don't you go ahead and make your record on it?

Mr. May: O.K.—All right, sir. I can put up the evidence.

Mr. Stark: Well, Your Honor, we're not—don't want to delay because we've agreed to on them introducing affidavits of whatever, so we can get a complete record because really they're trying to establish, I think, basically their method of operation, and we're not that well acquainted. Uh—so I told him that, but we would if he brought in affidavits we would not resist the introduction of the affidavits. The other matter in order that—uh—a complete record would be built in the case, cause I'm sure that we will probably have to appeal at some time because we need direction in this particular matter—**[Tr. 6]** uh—due to the fact we can't seem to receive it. Otherwise, we probably have to go and get it from the courts to tell us how to handle, because we have now, I believe—what four or five importers operating in the country, some televisions—uh, Panasonic—uh, two or three other Japanese outfits—so its getting to be a mass—substantial amount of tax involved and we need some direction in how to handle this matter and that's really why we brought the matter to a head this way, to find out really where we stand.

Mr. May: That's our intention also, Your Honor, and this—uh—we've agreed with, can be a final hearing and the court can issue a final order so that either side might appeal and get a final ruling if we desire and we do have an affidavit, one affidavit which I have—uh—served on Mr. Stark in which I would also like to read into the record and tender into court. This is the affidavit of Mr. Roland A. LeCroy personally appeared before the undersigned officer Roland A. LeCroy who after being first duly sworn deposes and says on oath as follows: 1. This affidavit is made to be submitted to Superior Court of Gwinnett County, Georgia as evidence on behalf of the Plaintiff in the above styled action and all facts herein stated are within the personal knowledge of the affiant. 2. At all times material herein affiant has been and is now the administrative manager of Michelin Tire Corp. and as such has personal knowledge of the facts herein and after stated. 3. Michelin Tire Corp. is a corporation **[Tr. 7]** organized and existing under the laws of the State of New York with its principal place of business and late success, New York and is authorized to and transacting business in Gwinnett County, Georgia at 2169 Interstate 85, Norcross, Georgia. 4. Michelin Tire Corp. is engaged in the business of importing into the United States automobile and truck tires and tubes manufactured outside the United States and distributing such tires and tubes through franchise tire dealers as a part of such business. Michelin operates a distribution warehouse located in Gwinnett County, Georgia and all tires and tubes which flow into such warehouse are imported by Michelin from factories outside the United States in which such tires and tubes are manufactured and subsequently flow out from the Gwinnett County warehouse to destinations scattered throughout six southeastern states. Michelin is required to pay to the United States of America a 4% import duty on all of the tires and tubes which it imports from factories outside the United States and said 4% import duty was paid by Michelin on all of the imported tires and tubes located in the Gwinnett County warehouse on January 1, 1972 and

January 1, 1973 which, your honor, happened to be the two years that we are concerned with in this case. 6. Approximately 75% of the imported tires and tubes located in the Gwinnett County warehouse on January 1, 1972 and January 1, 1973 were transported from the factories outside the United States at which the same were manufactured to the Gwinnett County warehouse in **[Tr. 8]** vehicles commonly referred to as Sea Van trailers and the remaining 25% were transported in over-the-road trailers. Michelin Tire Corp. does not own or lease any of the Sea Van trailers or any of the over-the-road trailers in which that imported tires and tubes are transported and all of such trailers are owned by the shipping companies who transport the imported tires and tubes. As of January 1, 1972 and January 1, 1973 respectfully none of the imported tires and tubes located in the Gwinnett County warehouse were pledged or hypothecated by Michelin as security for any loan. 9. Michelin Tire Corp. did not receive any notice of any correction or change made by the Tax Assessors of Gwinnett County, Georgia in the 1972 personal property tax return filed by Michelin and did not know that its return had been changed by the assessors until it received 1972 Gwinnett County tax bill number 24559 from the Tax Commissioner of Gwinnett County, Georgia. Michelin Tire Corp. did not receive any notice of any correction change made by the Tax Assessors of Gwinnett County, Georgia in the 1973 personal property tax return filed by Michelin and had no knowledge that any correction or change in its 1973 return was being considered by the Tax Assessors of Gwinnett County, Georgia until it received a letter dated August 24, 1973 from Mr. Robert L. Wilson, Administrator of the Board of Tax Assessors, Gwinnett County, Georgia requesting a meeting with representatives of Michelin for the purpose of discussing the velleity of the inventory **[Tr. 9]** exemption claimed by Michelin in its 1973 return. 11. The NOD returns attached to the Plaintiff's complaint as Exhibits H and I respectively were filed by Mr. Robert L. Wilson, Administrator of the Board of Tax Assessors of Gwinnett County, Georgia

without the knowledge or consent of Michelin Tire Corp. and Michelin has at no time authorized or ratified the filing of either of said returns. 12. As of January 1, 1972, passenger tubes which has been removed from the original cartons and having a value of $633.92 were owned by Michelin Tire Corp. and located in its warehouse in Gwinnett County, Georgia. On January 1, 1973, passenger tubes which had been removed from the original cartons and having a value of $664.22 were owned by Michelin Tire Corp. and located in its warehouse in Gwinnett County, Georgia this 20th day of March, 1974. Signed Roland A. LeCroy, and sworn to before Ellen Sue Baracove, New York Notary Public with the seal of the state, Your Honor. I offer this affidavit in evidence.

Mr. Stark: We have no objections, Your Honor.

Mr. May: Hand it up to Your Honor.

The Court: This Plaintiff marked exhibit.

Mr. May: Excuse me, I'm sorry, that would be Plaintiff No. 1. Your Honor, we would like to call at this time Mr. Roland E. Stone. Mr. Stone, would you come around please? Raise your right hand please, swear the testimony you are about to give in the hearing shall be the truth, the whole truth and nothing but the truth, so help you God?

Mr. Roland E. Stone: Yes.

ROBERT E. STONE

[Tr. 10] Q. Would you please state your name and present address? A. My name is Robert E. Stone and I live at 4196 Hambrick Way, Stone Mountain, Georgia.

Q. And by whom are you presently employed, Mr. Stone? A. Michelin Tire Corp.

Q. And in what capacity? A. Trans Operation Manager of the Norcross facility.

Q. Alright sir, how long have you been employed in the capacity? A. In that capacity almost four years.

Q. Alright, sir. So you were employed in that capacity on January 1, 1972 and January 1, 1973. A. Yes, sir.

Q. Alright sir. In what business is Michelin Tire Corp. presently engaged, Mr. Stone? A. Michelin Tire is primarily engaged in the importing of tires and tubes, uh—and distributing them to franchise dealers throughout a six state area in the southeast.

Q. Alright sir, and was Michelin Tire Corp. engaged in business in Gwinnett County, Georgia on the two dates that we have mentioned, January 1, 1972 and January 1, 1973. A. Yes, sir. They were.

Q. Please describe the nature of the business which was being conducted by Michelin in Gwinnett County on those two dates. A. Michelin was engaged in the distribution of these imported tires and tubes, uh—to the various franchise dealers within the six state area.

[Tr. 11] Q. Alright, sir, as of January 1, 72 and 73, would you tell the court whether or not all of the tires and tubes located in the Gwinnett County warehouse were tires and tubes which had been imported from outside the United States? A. Uh—yes, sir, with the exception of a small amount of domestic tubes.

Q. With the exception of a small amount of domestic tubes, now let stop a minute, do I understand that as of January 1, 1972 and 73 all of the tires located in the warehouse had been imported by Michelin from a foreign country with the exception of certain domestic tubes? A. Yes.

Q. Now with respect to these domestic tubes, uh—Mr. Stone, when did you first remember the existence of these domestic

tubes? A. Yesterday about 10:30 when you and I were discussing the case.

Q. Alright sir and would you tell the judge how those domestic tubes come to be in the inventory on those two dates? A. Back in—uh—1971 at some point we were experiencing a severe shortage of various size tubes of our Michelin tubes, so it was a decision of upper management in Michelin Tire Corp. to purchase some domestically made tubes to supply to our franchise dealers upon request so that we might be able to supply them with their needs.

Q. Alright sir. In those, uh—the domestic tubes that you remembered yesterday might have been in inventory and upon checking you did find—— A. Yes——

Q. ——that there was some?
[Tr. 12] Mr. May: And, uh—we'll go into that a little further later, your honor, that's about these domestic tubes.

Q. Now getting back to the tires and tubes that were in inventory on January 1, 72 and 73, what was the purpose of having those imported tires and tubes in the Gwinnett County warehouse on those dates? A. The sole purpose of having these imported tires there were to, uh—weighing distribution to the dealers.

Q. Alright sir. Now how were the imported tires and tubes that were located in the warehouse on those two dates transported from the factory that which they were manufactured outside the United States? How were they transported from those factories to the Gwinnett County warehouse? A. Basically two methods are used to import our product, one is a Sea Van trailer, that is loaded at the factory and then is finally transported to our warehouse and the other is by common carrier or over-the-road trailer. These are basically two methods that are used.

Q. I see. In what form are these tires imported? A. Well, in all cases they're in a what you would consider a bulk state, they're loaded into the trailers, uh—in a bulk fashion.

Q. Do you have any packages on them, or, the tires, are they wrapped packages in any—— A. Each tire is loose, each tire is an individual, uh—item.

Q. By the way, does each tire have a separate serial number which distinguishes it from any other tire? A. Yes, sir.
[Tr. 13] Q. Alright, and so you say that these arrive in bulk without any packaging at the time they arrive at your warehouse? A. Yes, sir.

Q. Did you at my request take some photographs showing the form in which the imported tires are received at the Gwinnett County warehouse? A. Yes, I did.

Q. Approximately when did you take these photographs? A. Approximately two or three months ago.

Mr. May: Now—ask the reporter to mark this as P-2, please.

Q. I hand you a Exhibit marked P-2 for identification, Mr. Stone and ask you if these are the photographs which you took at my request? A. Yes, they are.

Q. Are these photographs a true and accurate representation of the form in which the imported tires are received at the Gwinnett County warehouse? A. Yes.

Mr. May: Your Honor, please, I would like to offer these photographs in evidence.

The Court: Any objections, Mr. Stark?

Mr. Stark: No, no objections.

Q. Would you take this, Mr. Stone, and, and simply point out to the judge anything particular you would like to as to the manner in which the tires are received? You might tell him what, what is this vehicle that there in there. Is that a Sea Van

trailer or regular trailer? A. That is simply a Sea Van trailer, uh—in which we receive approx——

[Tr. 14] Mr. Stark: What is a Sea Van trailer?

Witness: It's nothing more than a trailer that the wheels can be detached from in order to stack more easily on a ship.

The Court: Were these tires loaded and brought?

Witness: Yes, sir.

The Court: Shipped on a ship?

Witness: Yes, sir.

The Court: I understand it, thank you.

Witness: Yes, Your honor.

The Court: Nothing like package freight in this area?

Witness: I'm not familiar with it.

The Court: Trailers on a freight car with wheels on it, I believe?

Mr. May: Since the judge has ask that question, Mr. Stone, would you, would you tell us as best you understand it the procedure that is used in, from lets say from the time the tires are loaded in the vehicle in which they are transported until they arrive at your warehouse in Gwinnett County?

Witness: Well, the tires are simply loaded as in the state that you can see in the photographs, uh—at the factory and are then transported to the loading docks at some European or foreign court and at that point a crane lifts the trailer up and the wheels are detached and are placed on a board a sea going vessel and then are transported across the water and the opposite is, is a—takes place at the local, the domestic port and the trailer is placed back on wheels and a piece of our equipment is hooked up to it and is transported to our dock.

Q. Alright sir. You mean your dock at the warehouse? A. To Michelin Tire Corp.

[Tr. 15] Q. In Gwinnett County, you're talking about your receiving dock—— A. Yes.

Q. ——as opposed to a shipping situation, I mean a boat dock? A. Yes.

Q. Alright, your Honor, uh—since you asked the question I'll go ahead into this line of evidence right now. Mr. Stone, did you also at my request take a series of photographs showing various Sea Van trailers in which you received shipment of tires at the Gwinnett County warehouse and did you also take a series of photographs showing a various common carrier trailers that you received tires in—shipment of tires at the Gwinnett County warehouse? A. Yes, sir.

Q. Approximately when did you take those photographs? A. At the same time the others were taken.

Mr. May: Mr. Stone, Mr. Stark said he had no objections your Honor, so I'll just have these marked as P-3 and P-4.

Q. Mr. Stone, I hand you what has been admitted in evidence as Plaintiff Exhibit No. 3 and ask if you will to explain to Judge Pittard what those photographs represent and to all of us for that matter. A. Your Honor, these are simply Sea Van trailers where they have been pulled up to our dock, our warehouse dock, and have been unloaded. They are still attached to what in the freight business are called power equipment. They are tractor trailer units and which join various companies, various trailer companies.

[Tr. 16] Q. And this is what on P-4? A. In comparison these are simply ordinary trailers that are, uh—used within the United States over the road.

The Court: Where would these trailers be loaded, ordinary trailers?

Witness: I'm not sure I understand your question.

Mr. May: Where the tires, where would——

The Court: ——the tires, where would the tires come from at the trailer?

A. From our Canadian factories.

The Court: Still imported, I might say.

Mr. May: Yes, sir, yes, sir.

Q. So that in reality, Mr. Stone, is there any real difference in a Sea Van trailer and an ordinary trailer? A. No, sir.

Q. Objective ask that the only minor difference I take it is the Sea Van, the wheels are removable so that they can be stacked on board a ship and that can be done with an ordinary over-the-road trailer. Is that basically the only difference? A. Yes, sir.

Q. Alright, sir. Now are the imported tires and tubes, I may have asked you this before, that are received at, excuse me. Are the imported tires that are received at the Gwinnett County warehouse, uh—fastened together in any way? Do they have metal binders, or are they on pallets, or, are they just like shown in that photograph, Plaintiff Exhibit No. 2? A. All tires whether they be trucked, passenger or commercial tires are received in unifederal units, not tied or strapped together in any fashion.

[Tr. 17] Q. Alright, sir. As of January 1, 72 and January 1, 73, what if anything had been done to the imported tires located in Gwinnett County warehouse in the way of modifying them or changing them in any way from the shape and form in which they were imported into this country? A. Absolutely nothing.

Q. Alright, sir. Well, obviously they, of course, they had been removed from the trailer? A. It was stacked, uh—they were removed from the trailers and were stacked on pallets

segregated by size, placed in the warehouse awaiting distribution onto the franchise dealers.

Q. But other than that nothing had been done and the tire was exactly the same form and shape in which it was imported into the country. Is that correct? A. Yes.

Q. Alright, sir. In what form are the imported tubes when they arrive at the Gwinnett County warehouse, Mr. Stone? A. The tubes are in a corrugated outer master carton and within each master carton the individual tubes are, or each tube is individually packed in a smaller carton and the number of tubes within a carton is determined by its size.

Q. You see if I understand, there is an, there's, there is what we could call a shipping carton, an outside cardboard container. A. Yes, this is a heavy corrugated carton that is used, uh—what we would call in the industry, a master carton or a shipping carton, uh—it's of a heavy corrugated nature and within each of those, uh—you have a smaller carton with one tube in each carton.

[Tr. 18] Q. I see. Alright, sir. Now, uh—as of January 1, 72 and January 1, 73, what if anything has been done to the imported tube located in the Gwinnett County warehouse, in the way of modifing or changing them in anyway from the shape or form in which they are originally imported into this country. A. Well, nothing has been done to alter their shape or form. There have, there were some that had been removed from the master carton and had then also removed from the full case area and brought into a shelter area where they were placed on shelves for resale in smaller quantities.

Q. You say some had been removed from what was that term you used, full case? A. Full case areas where we keep full cases of all these.

Q. Is this a section of your warehouse, yes, that you refer to as the full case area? A. Yes.

Q. And is there another section of your warehouse that you refer to as the shelf area? A. Yes, sir.

Q. And then, am I, do I understand that when you open one of these cartons in which the imported tubes originally arrive at your warehouse . . . Strike that please, sir. Before you open one, where are the cartons kept in the warehouse, the cartons of tubes? A. Well, they're kept in the warehouse segregated by size in what we would call full case area and when it does become necessary to open a case, then the case is brought forward into the shelf area and the tubes are removed from the outer shipping carton and placed on a shelf, uh—in the warehouse.

Q. In the little boxes each individual tube is in a little box which you take the little box out of the big box **[Tr. 19]** and put it up on a shelf. Is that basically what you're saying when you open a carton? A. That's correct.

Q. I see, but except for those, uh—the tubes are still in the same shape and form in which you received them in the same package in which you received them until such time as you break the carton. Is that correct? A. That's correct.

Q. Alright, sir. Now, uh—as of January 1, 72 and 73, were there any tubes in the Gwinnett County warehouse which had been removed from the original cartons? A. Yes.

Q. Do you recall what the fair market value of those tubes were on each of those two dates? A. Uh, yes, I believe I supplied that figure, it was, both dates, were somewhere around $600, some odd dollars.

Q. Alright, sir. Had the advalorem taxes due on those passenger tubes that had been removed from the cartons been paid to Gwinnett County? A. Yes.

Q. Alright, Mr. Stone I already ask you about the discovery on yesterday of these domestic tubes. Let me ask you this, in

what form are these domestic tubes when they arrive at Gwinnett County?

The Court: Let me interrupt you, just a minute——

Mr. May: Yes, sir.

The Court: ——before you go on with that. Are you saying that $600 and some odd dollars worth of tubes that you pay taxes on would be tubes that you had broken your master cart, carton taking the tubes into individual boxes **[Tr. 20]** from the master carton, in so, in so many ways place them into stock for sale, set up on shelves?

Witness: Yes, your Honor.

The Court: Do you consider those are subject to advalorem taxes?

Mr. May: Yes, sir. We concede that.

The Court: When one's——

Mr. May: Where the original package, if it comes in a package, your Honor, if the original package has been broken, uh—and we conceded the tax ability of that and have in fact paid the tax on those.

Q. I was talking about these domestic tubes, uh—just so the record will be clear how do you get those when you have to buy those in that one instance, uh—how did those come to your warehouse, in what form? A. Well, as far as I know all domestic manufacturers use basically the same method of packaging as we received on this one time that these were purchased and they come in a, in a master carton or corrugated carton. Within that carton are tubes rolled up and loose, they are not within an inner shipping or in a smaller carton. These were received in that fashion.

Q. Alright, sir, and what if anything is done with those tubes when the shipping carton is broken? A. In those few

instances where these required being broken, uh—of course the same thing would have been done with those as were done with the Michelin tubes, they were pulled out from the full case arch of the domestic tubes and brought forward into a similar shelf area as we have our Michelin tubes.

Q. Are the domestic tubes at anytime ever mixed with, or **[Tr. 21]** comingled with the imported tubes? A. No, sir.

Q. And am I correct at all times the imported tubes are kept separate and apart from the domestic tubes? A. Yes.

Q. Alright——

Mr. Stark: Your Honor, I am of course, I don't know, going through this, I believe we are just telling the witness what to state. I, I think when he says comingling we are using these terms that relate to what we are getting down to the basic facts of the case here. I think if the witness, you know I don't object, but when he says do you comingle and he's telling him what to say about it, I think we're getting a little bit far out, when he says that he's got domestic tubes in a box here and, and imported tubes here in the same room. That's a legal term as to where they've been comingled and I don't much believe that this witness is qualified to testify on that.

Mr. May: Your Honor, I think some of what Mr. Stark said is a valid objection and I apologize for leading the witness but this is not a jury and he has got the right to cross-examine.

Mr. Stark: I just, uh—think we are getting into legal terminology. As long as he stays away from legal terms I have no objections.

Q. Let me ask you that Mr. Stone, do these domestic tubes have any markings on the carton, or on the tube? A. Well, the, the, hu—domestic tubes are, the cartons are **[Tr. 22]** marked with the manufacturer's name and size description and then

each tube itself is stamped with the, uh—manufacturer's name and also some description.

Q. And what if anything does that fact enable you to do in terms of distinguishing between the Michelin tube and a domestic tube? And when I say a Michelin, I mean an imported tube. A. Well, its no chance that we could ever get any of them mixed up, they're quite obvious, too.

The manufacturers of Michelin tire and the manufacturers of competitive tire tube and manufacturers of competitive tube.

Q. Alright, sir. What was the fair market value of the domestic tube in inventory on January 1, 72 and 73? A. As best of my recollection, I believe 1972 was somewhere close to $10,000 and 1973 was say a thousand bucks.

Mr. May: Now I would state in my place that on—to the amendment yesterday afternoon, I spoke with Mr. Wilson and calculated the tax due on those values and I have this morning in open court given him a check payable to the Tax Commissioner of the County in payment of those additional taxes which we admit to be due. May I have just a moment, your Honor?

Q. Just a couple of more questions, Mr. Stone, with respect to the domestic tubes and the imported tubes. State whether or not that ever at anytime those tubes were put in a—in the same pile. A. No, sir. There's, there is no way you can put them in a same pile. I'm not too clear of your question, uh—you have Michelin tubes in one spot and you have whatever the competitive tubes was in another spot.

[Tr. 23] Q. Might have been Goodyear or something like that? A. Yes, sir. Perelli, Bridgestone, I believe there were about three different manufacturers purchased at this one point in our history when we were short of tubes and uh, at no time were they kept at the, in the same proximity because, uh—they just weren't.

Mr. May: Keep with it, Mr. Stark.

Questions by Homer Stark

Q. Mr. Stone, are you familiar with the general corporate set up of Michelin Tire as to how it is set up to, uh—where the tires are made, who makes the tires and the overall organization of the Michelin Corp.? A. Uh—Vaguely, and I would have to answer that I might in those terms, uh——

Mr. Stark: o.k.

Witness: ——I generally——

Q. Well let me ask you some general questions about the operation. Who manufactures the tires, uh—in Nova Scotia? What is the name of the company that actually manufactures the tires in Nova Scotia? A. Michelin Tires Limited, I believe would be.

Q. Is that a, uh—French, uh—Corp. or is that the headquarters of that particular corporation in France, or is it in Canada, do you know? A. I can't say with complete authority. I would only be assuming at this point to answer that question.

Q. Is it manufactured in the Michelin Factory or are these tires made by somebody for Michelin, or are they manufactured in the Michelin plant? A. No, sir. I believe that I can honestly answer that all **[Tr. 24]** Michelin products are manufactured by Michelin Tire Corp., uh—whatever the apparent organization may be called.

Q. Now what about the ones in France? I believe this is the main headquarters of the Michelin Tire Corp. What is the name of the company that manufactures the tires there? A. Michelin Tire and I'm not sure whether its corporation, limited, whatever, it is Michelin and——

Q. Well, did the corporation the, uh—organization, uh—start in France? Was that the original headquarters of the making of these tires. A. Yes, sir.

Q. Uh—Now in the petition it says that the Plaintiffs corporated existing under the law of the state of New York. Now is Michelin Tire Corp., is that the headquarters of Michelin Tire Corp. itself? A. Uh—Of Michelin Tire Corp., U.S.A., yes.

Q. So that is a, uh—, you have one corporation, Michelin Tire Limited, then presumably that manufactures these tires in Nova Scotia and France. Do you have any other place where they are manufactured? A. Uh—Yes, sir.

Q. Yes, sir. Now which one of the companies actually import the tires into the United States? Is it Michelin Tire Co., New York, or is it imported by, uh—Michelin Tire, Limited, the company that manufactures the product. A. I can't answer that. I do not know.

Q. Now you are employed by what company, what is your employer designated as? **[Tr. 25]** A. I am employed by Michelin Tire Corp.

Q. Is that of—that of New York? Is that your apparent headquarters there? A. Yes.

Q. And so you are a employee of the domestic corporation and I believe it states in the petition that this corporation is transacting business in Georgia and authorized to do so. I presume that this New York Corporation is registered to do business within the State of Georgia. Is that correct? A. Yes.

Q. And this is the company he works for? A. Yes.

Q. But it's not the company that actually manufactures the, the product itself? A. May I answer that in another way than yes?

Mr. Stark: Oh yes, yes, sure you can explain.

A. You are getting me involved in a technical aspect of our corporation, our company that I honestly can not give you any information on. I do not have the information, I do not know. I've never looked into this aspect of the corporation of the com-

pany. When you bring in the limited aspects of either, simply terminologies that is used in various companies. There is only one Michelin Tire, whatever. It is a privately owned company of its parent office in France, of which all other countries are directly connected, so if you mind.

Q. So it may be that this Michelin Tire Corp. is a subsidiary? Would this be the way you would normally **[Tr. 26]** describe it, of the parent company in France? A. I honestly can not answer that because I don't know the legal aspects. You are getting me involved in something I'm just not——

Q. Alright, who actually brings the tires into the company who, country, who pays the import duty on the tire when they reach the port of origin, uh—I mean the port of entry in the United States, or at the point of entry? Do you know that? A. Well, it is my understanding that Michelin Tire Corp. is responsible for, through a broker within each port of paying the custom duty. Now who is the broker or importer that actually brings the tires into this country.

Q. Do you know what company that you receive these tires from? What company, do you have an import country that you actually, uh—submits the tires to the proper authority, as far as the paper work is concerned and gets the import paid, or how is this handled? A. We use a broker simply for the documentation of the import, uh—various import duties, various import requirements, and this is Intermaritine Forwarding Corp. of New York City.

Q. Are these an import, export company that handles this part for you? A. Uh—not an import company as such. They are simply, uh—hired by us to perform the documentation necessary for the importing of the tires into this country.

Q. Well, do they hold a status as an importer, or—— **[Tr. 27]** A. I cannot answer that.

Q. You don't know whether they are in fact a, an importer or exporter? A. I, I can only assume, uh—and I couldn't state

positively, but it is my understanding that we are also the importer. We only use this Intermaritime Forwarding Agent, uh—in order to simplify the methods of bringing our goods into this country. Its most——

Q. Is that because they're licensed to import, export people that you use them as a matter of convenience to bring your product into the country through regular importing channels? A. There again, I can not answer that.

Q. O.K. Now once the tires are shipped from the factories, uh—I believe you state that they are in what is known as a sea-going container. Would you state for the record what a sea-going container is? How its designed, and built and its size? A. Well, the Sea Van trailers are simply, us—approximately, the same size as a, uh—ordinary trailer.

Q. What would be the length, the height and width? A. Approximately, I'm not exactly——

Q. ——but just give me an approximation for the record. A. 40 feet in length, uh—with wheels attached 12′ 6″. I would guess them to be actually the height from the floor of the trailer to the top of the roof. It would 9—8½ feet and about 8 feet wide.

Q. O.K. Now, uh—the tires are at what point placed in **[Tr. 28]** this sea-going van or container? At what point are they actually put in, physically put into the container? A. It is my understanding that they are placed in at our factories.

Q. So they are placed in loose. I believe you now testified that they, they're not bound together. They are loosely stacked in, within the van or container. A. Yes.

Q. And then is the, what is the door closed and sealed, or what is the method of securing the trailer? Do you have, uh—sealed locks or a method of sealing them at the point, uh—and then unsealing them at another point, or what is your method on that? A. The door are closed, and the seal is attached, and

the seal is normally not broken until it arrives at our warehouse, or at the, portman of customs breaks it, uh—to look into it and then reseals it at that point.

Q. Well, when they arrive at your warehouse, is the van sealed at that time? A. Yes.

Q. O.K. Do ya'll break the seal and open up the sea-going container at that point?

Witness: Would you repeat the question?

Q. Well, do you break the seal on the outside and then open the van, unlock the van, and then open it up when it reaches your dock at your warehouse? A. Yes.

Q. In Gwinnett County? A. Yes.

Q. O.K. So, basically the van is, is still with tires in **[Tr. 29]** France. Say its put in the ship, its transported by ship, say to New York which would be a port of entry. At that point its taken off the ship, placed on the back of a truck or trailer with a bed, right? With wheels on it? A. Well, uh—yes, except that it would not be a, a truck, uh, uh—May I describe this?

Mr. Stark: Yes.

A. ——is a question of this, the, uh—Sea Van trailer is, actually has simply what in the industry is called a bogie or a chassis, which is nothing more than the same thing that you would find on an ordinary trailer, except that it can easily be detached and placed back on so you couldn't call it a flat bed truck or something like that.

Q. O.K. Now what is the time interval between the time that it comes in at the port in New York and until it is placed on this truck, or this bed so to speak, with, uh—you know with the, uh —what they call usually a cab. I guess that was transported here, what is the time interval normally between the time it comes in until the time it would be sent to your warehouse here in Gwinnett County? A. Well, sir, to begin with, uh—I can not

remember in the history of our Gwinnett County operation of having received, uh—Sea Van trailers to the port of New York as such.

Q. Well, just using that as a illustration, say some other port, what other, what other port do they normally come in? **[Tr. 30]** A. Uh—our major, a major amount are coming to the ports of Savannah.

Q. Well, just illustrate how they come in through Savannah, and what the normal procedure is in time element as far as your operation is concerned. A. Alright, sir. They are unloaded from the ship usually, uh—within a day or two determining on how rapidly the customs officials are able to clear the shipment, uh—and normally this will, should take place within two to three days and then determining on the size of the shipment, the number of trailers involved in it, uh—they should all arrive at our warehouse within seven to eight days from the time the ships arrives at port.

Q. O.K. What disposition is made once they clear custom down there before you pick them up? What disposition is made of these vans, uh awaiting your picking them up and bringing them to your warehouse? A. If I understand the question, you're asking where are they stored?

Q. That's correct. A. Of course this is up to the steam ship company, uh—this is their problem until our, we assign a truck line to pick them up.

Q. Do you send the truck line down yourself to pick them up? A. Uh—We don't send it down. Yes, we acquire a truck line to haul, transport the trailer from the port to the warehouse.

Q. Where do they pick them up at the port? A. Uh—They pick them up in the container yards, so they're called.

[Tr. 31] Q. O.K. Are these owned by import companies, these container yards? Is that one of the services you get from the importer, that he does have the yards, or is it there at the cus-

toms? Is this on government property or is this an importer's property? Where they are picked up? A. This is the property of the steam ship line.

Q. The containers are still on the property of the steamship line when they are picked up. A. Yes.

Q. O.K. So they are brought then directly to your warehouse, or is there anywhere in transit that they stop off before they reach your warehouse? A. Well, the, uh—the carrier picks up the trailers and he, uh—would bring them certainly into his, his yard in, in Atlanta.

Q. Who is the carrier of this yard that was used? A. Uh—it could be any number of carriers as such. We use various carriers in transporting of all of our merchandise. Uh—all carriers have a, a yard in dock, in self-docking facility, uh—within a called terminals, within a greater Atlanta area and they would call those in and then they would dispatch them out to our warehouse from that point.

Q. O.K. How many warehouses then are they? Are they sealed at that point, when they are brought out to your warehouse? A. Yes.

Q. And y'all open the van and take the tires out? A. Yes.

[Tr. 32] Q. O.K. Now what do you do with the tires once you've opened the sealed van there at the dock at your warehouse? What disposition is made of the tires at that point? A. The tires are unloaded on to pallets by size.

Q. Now these wooden, when you talking about pallets, you're talking about wooden pallets? A. Yes.

Mr. Stark: O.K.

A. ——and, uh—then are stacked by size, they are segregated by size within the warehouse.

Q. Are they bound to these pallets? A. No, sir.

Q. You just separate different sizes by wooden pallets, is that your method of separating them, or now when you say a wooden pallet, I don't quite visualize what you're talking about. I visualize a wooden pallet as a, uh—wooden platform type thing that gives you material to store it on. But are the tires bound to that pallet in any way, or, are they just loosely stacked on a wooden pallet? A. They are loosely stacked on a wooden pallet.

Q. And then the pallet is picked up and transported into your warehouse? A. Yes.

Q. O.K. And is this, do you have shelving there also like in the normal tire, uh, uh—store or the tire distribution, distribution center where you have them stacked on shelves according to size also? A. Well, I, I don't know whether it would be considered **[Tr. 33]** a normal tire store, uh—may I just describe the——

Mr. Stark: Yea, well you just describe how you store them there in your warehouse and that might be a better question.

A. ——alright, they are stacked, truck tires are stacked four stacks of, uh—five tires each on each large pallet and then a heavy cardboard comb is placed down through the center and another pallet of those tires are placed on that one, three high.

Q. Do you have any shelving there, though you can take individual tires and put them in racks so to speak, uh stack them that way, uh—not on top of each other, but stack them side by side—side by side stacking? A. No, sir.

Q. O.K. Uh—Now as to the tires that come in do they come in with the tires, I mean with the tubes, do they come in with the tires or, are they usually separate vans or how do they come in? Uh, uh—when and how do you receive them? A. They can come in, either with the tires or a full trailer, uh—load of tubes.

Q. Alright, now where are these tubes manufactured? A. They are all imported.

Q. Are they manufactured at the same places as the tires, in Nova Scotia and France? A. Uh—I would assume so, yes.

Q. Well are any of them manufactured within this country? A. No, sir.

Q. Do, are any of the Michelin tires manufactured at this time within the country, or tubes? A. No, sir.

Q. Uh—is there any plants underway or factories underway **[Tr. 34]** that manufacture Michelin tires at this time? A. Yes, sir.

Q. Where will that be located? A. Uh—Greenville, South Carolina.

Q. But you're not receiving at this time any tires from that particular plant, is that correct? A. This is correct.

Q. So none of the tires that you had during the period of the subject of controversy were tires from, uh—domestic productions? A. That is correct.

Q. Alright, the tubes come in, in cartons and I believe you testified that they were in individual little boxes, within, in a larger carton? A. Yes.

Q. And the domestic tubes, uh—that you had in storage, were also in large cartons. Is that correct? A. They were in corrugated shipping cartons.

Q. Yes, how big of a carton would you state that they are in, approximately? A. Those as I remember them to be were in, uh—corrugated cartons measuring approximately 15 by 16 by 16.

Q. Is that inches you are talking about? A. Yes, sir.

Q. O.K. And how about the Michelin cartons that the tubes are in, what were their size? A. The normal Michelin shipping carton is approximately 16 by 18, I'm sorry, 16 by 20 by 24 inches.

Q. And how many, uh—on these dates I believe you gave us awhile ago the amount of, uh—imports that you, or **[Tr. 35]** domestic tires that you had on January 1, '72 and January 1, 73. How much, uh—imported tires did you have on that date? Do you know approximately the value of the imported tires that you had on hand at that time? A. No time I, did I ever have any imported tires.

Q. I mean, I'm sorry, imported tubes let me relate the tubes in. O.K. you testified that you had 10,000 dollars worth of domestic tubes in 1972 roughly 6000, 1973. What was the value on January 1st, 72 of your imported tubes? A. I, I would have to research that I wouldn't have any idea.

Mr. May: May I point out, your Honor, that the returns attached to the complaint as Exhibits and which are admitted show the value of the total value of the inventory claimed to be exempt, uh—Homer, uh there?

Mr. Stark: Well, the only thing there could be some question of intermingling of tires that might subject the tires, uh—I mean tubes that might subject this to tax. That's the only thing I was trying to get for the record so we would have a clear meaning of what, uh—what tubes, uh, if they're considered intermingling there. But he didn't, you don't have that information as to the value of the, uh—tubes imported as of February 1st, 72, uh—or January 1st, 73?

Witness: Now . . .

Q. O.K. Now when the, when the products come in from Nova Scotia, are they shipped in and enter at Savannah, or do they come by truck from Nova Scotia? A. Uh, I would judge that 75% of the, the, uh—tires that **[Tr. 36]** come in from Nova Scotia, come in by ordinary trailer, uh, through the Portland, Maine customs, uh—port. They're brought down by land, uh—a carrier. The other portions can be placed on a, on a, uh—Sea Van ship at the Lahar, I'm sorry, at Halifax and

would be transported by water down to the port of Charlestown, Savannah, or Jacksonville, and dispersed there.

Q. O.K. The ones coming in, uh—in Maine, uh—how is the import handled on that? Is the duty paid on it as an imported item at port of entry there in Maine? A. Yes.

Q. O.K. Do you have a firm there also handling the import and filing the documents for you necessary to get it imported into the county? A. Yes.

Q. Is this, what is the company there that handles it where its coming into the state of Maine. A. I, I do not have the knowledge, our main forwarding agent and, uh—that, that is the term that is used with this company is Intermaritime Forwarding Agent out of New York City, now who they are using up there I would have to check.

Q. Well, are they, they handling, also the, the importing through the state of Maine then? A. When the port of entry, yes, sir, I mean the, uh place of entry is at that place.

Q. O.K. Now, uh—are all of your tires and tubes then handled in the, a similar manner throughout your warehouse, I assume. Is that correct, as far as **[Tr. 37]** your stacking procedure that you have just related to me, uh—as to how they are stacked in the warehouse on these pallets and the tire, tubes are in boxes. Is that correct?

Witness: Throughout my warehouse?

Mr. Stark: Yes.

A. Yes, that is correct.

Q. Now who owns the, the property on which this warehouse is located? A. Uh, Michelin.

Q. Michelin actually owns the real estate? A. Yes, sir.

Q. Is that, uh, the same as the Plaintiff in this action, or is it owned by another corporation? A. Uh—there again I don't have knowledge of this.

Q. O.K. Who has the overall supervision of the warehouse? Is this your responsibility? A. Yes.

Q. O.K. Would you state your method of handling these tires once they reach the warehouse? How do you, uh—handle the distribution of the tires out of the warehouse at that point? I believe you testified that there were franchise dealers that you,—uh—did business with. What is your method of business with these franchise dealers? A. As, uh—their requirements are sent to us, we in turn prepare the orders for shipment and then call in various methods of transportation and have them transported to them.

Q. Alright. Well, just say for illustrations you have a **[Tr. 38]** dealer in Lawrenceville, or a Jack Smith Radial Michelin Tires, if he wanted X number of tires at a certain size what would be his method of getting these tires from your warehouse? A. Well, it would be either by, uh—common carrier or UPS or he could come in on a customer pick-up basis, and pick them up.

Q. In other words, if he called in and he needed four tires of a certain size he could send his truck down to your warehouse and you would then pull out these individual tires that he is asking for and load 'em on his truck. Is that correct? A. Yes.

Q. So when you got them stacked in pallets you don't sell the whole pallet of tires, you, pull out tires as, uh—a retailer might ask for a certain number of a certain size? A. Yes.

Q. Are you paid then or do you bill your, uh—franchise agent or what is your method of payment at that time? Do you just bill them as a franchise agent for these tires and then he pays you based on billing? A. Yes.

Q. How many franchise dealers do you have in the area? A. In our servicing area we would have approximately 250, 300 dealers at the present time being served by the Gwinnett County facility.

Q. And then you have a similar facility in Clayton County is that correct? A. Uh—

[Tr. 39] Mr. Stark: . . . south of Atlanta? A. We have a public, we are using a public warehouse in Clayton County.

Q. Is that under your operation or is that a, uh—separate operation? A. This would be under my jurisdiction.

Q. So some of your tires are stored here and then some of them are stored in this particular warehouse? A. Yes.

Q. Are they distributed out of the other warehouse on the same basis as you described as far as distribution in the Gwinnett County warehouse? A. Uh—yes.

Q. Do you have any domestic tires over there in that particular warehouse in Clayton County, tires manufactured within the United States or, are all of them imported? A. Uh—we have no American manufacturing on Michelin tires. All Michelin at this point are imported.

Q. Well, do you sell other tires, other brands other than Michelin? Do you have any that carry any other names other than Michelin, or, all that are manufactured within this country, country? A. No, sir.

Q. You don't carry any, uh—American brand tires at all? A. No, sir.

Q. Alright, now when the trucks come in, uh—from Canada we go to Maine, at which point they enter the United States. Uh—are these trucks also sealed at the plant up in, uh—Nova Scotia? A. Yes.

[Tr. 40] Q. O.K. Are they then brought directly from Maine directly to your warehouse or do they go to some distribution

point before they are sent to your warehouse? A. They go directly to our warehouse.

Q. So they are driven directly from Maine, directly to your warehouse here in Gwinnett County? A. Yes.

Q. They don't stop along the way, or they are not stored—uh—in transit or is this the normal procedure? A. Well, sir—uh—I can best answer that by saying that we certainly don't want them to stop along the way, but we don't have control over a common carrier, if he's going to stop along the way overnight or something. Uh—we can't judge that, but there is no intransit point where they come to rest with out knowledge. Uh—once that starts making movement from the factory, as far as we are concerned, it is to be a continual flow into our warehouse.

Q. O.K. Now do you have any warehouse? Do you have a warehouse in Savannah? Does Michelin lease or own a warehouse in Savannah. A. No, sir.

Mr. May: Just one or two questions redirect the example that Mr. Stark used about the local dealer here in Lawrenceville coming down and picking up the four tires. Is that a normal occurrence, or are your distributions made in bigger quantities than four tires at a time?

Witness: Yes, sir. They are made in much larger quantities than **[Tr. 41]** that—uh—most normally.

Mr. May: In just, in round figures what is your normal distribution to a franchise dealer? Does he order 50 tires at one time or a 100, or is there any average, there may not be?

Witness: You can strike an average. You would find that probably the average shipment is,—uh—45,000 lbs. in tires would be the average.

Mr. May: Now, Mr. Stone, could I, could I, or could Judge Pittard, or Mr. Stark or any of us drive down to your facility in

Gwinnett County and buy a set of tires to go on our automobile?

Witness: No, sir.

Mr. May: You distribute only to franchise dealers, is that correct?

Witness: That is correct.

Mr. May: And you said there were between 250 and 300 of those in the six southeastern states?

Witness: Yes.

Mr. May: And normally in quantities of 5000 lbs. or, or more?

Witness: Yes.

The Court: How many tires would be on one of these containers? How many thousand lbs. of tires was, would be on Sea Van trailers?

Witness: They would average 23 to 25 thousand lbs., your Honor.

The Court: You don't make distributions in the same amount of tires, the same volume of tires that come in on a sea trailer? You do make distributions of less tires than you receive on a Sea Van?

Witness: Uh—yes, your Honor.

Mr. May: I just want to make sure we cleared, I think you **[Tr. 42]** answered a question awhile ago and it may have been a slip of the tongue, maybe you and Mr. Stark both. If I recall correctly you said that you had no imported tires, I think you meant to say you had no domestic tires, am I correct? If you, if in fact the record shows that you said that, that was a slip of the tongue, was it not?

Witness: Yes, yes.

Mr. May: Is, I know I'm leading on one——

Mr. Stark: ——that's alright, that is alright if he made a mistake there. I'll try to get that.

Mr. May: ——I just wanted to be sure of that.

Witness: Yes.

Mr. May: Am I correct, this is to clear it up one more time, that the only tires located in Gwinnett County warehouse are imported tires?

Witness: That is correct.

Mr. May: Now one other point, I just wanted, you answered the question to Mr. Stark that you didn't have these tires in what I took you to mean an overhead rack type of arrangement where they are stacked up one, one by one. Was that your interpretation of the question he was asking you?

Witness: Uh—my interpretation of the question that was asked by Mr. Stark was that in retail stores you commonly see tires laying side by side upright as opposed to laying flat on top of the other and I answered it that no, we do not store tires on their tread surface. They are all stacked flat.

Mr. May: That's the imported tires.

[Tr. 43] Witness: Uh—yes, that is the only tire we have.

Mr. May: That's all I have, your Honor.

Mr. Stark: Uh—Mr. Stone, one little point here I failed to ask—uh—of course you said yourself that through your franchise dealers now normally in franchise agreement they have a certain requirement that only they, the licensed franchisers will sell or retail the product. But most of the franchise agreements also provide that on volume sales that you have a right to sell direct to certain type customers or you either reserve certain customers that are not allowed to be sold through the franchise. Do you have certain customers that buy directly from your—uh—

Michelin Tire Corp. operation here in Gwinnett County that have a large volume of tires, say a big user of consumer tires? Do you have any such customers?

Witness: I know of none. I know of no such dealer, all tires that are shipped to the best of my knowledge would go to the franchise dealer.

Mr. Stark: So you don't have any major, in other words, if a major customer come to you to buy tires and said I want 5000 tires of a certain type, you would not be able to sell it by a virtue of your franchise agreement, or you could sell it if you so elected?

Witness: I, as my understanding at the sales department, it would be responsible for this, would have to take him to one of our franchise dealers.

Mr. Stark: Now when the tires come in, are these various lots from the—uh—from either Nova Scotia or France? Are they separated by size? Is that the only way you go **[Tr. 44]** about separating them to put them on these pallets, certain types of the size tires?

Witness: By size and style.

Mr. Stark: O.K. Well, are the tires that are manufactured in Nova Scotia, the same as the tires that are manufactured in France as far as size and shape and confirmation of the particular tire?

Witness: Were we to receive what we could classify as a 10-hundred twenty truck tire from Canada and were we to receive the same tire from a French factory, the only difference in the two would be that one would say made in Canada and the other would say made in France. They would not be distinguishable any other way.

Mr. Stark: So they are not when they come in you don't separate them as to where they are, were manufactured, or do

you separate them basically on the size and the type of the tire? Is that correct?

Witness: That's correct.

Mr. Stark: So they're not in identifiable lots as far as where they are manufactured from, but just as to the general nature and size?

Witness: Correct:

Mr. Stark: We have nothing further, your Honor.

The Court: Why don't we take about half a hour and have some lunch,—uh—and I don't know how much other evidence we have. Do you know?

Mr. May: This completes our case, your Honor. We don't have——

Mr. Stark: ——We have just one witness, your Honor, that —uh—basically is to introduce—uh—the records—uh—of—uh——

The Court: Let me hear your witness then, Mr. Stark, and then we'll **[Tr. 45]** I have—uh—got another hearing a coming this afternoon and I got to leave to go somewhere I can't find any——

Mr. Stark: We may be able to stipulate, we have the originals of these documents. The main thing we just wanted, I believe he has copies and his complaint—uh—but it may be that a number of this—uh, uh—72. Where is your 72? Mr. Wilson?

Mr. Wilson: There they are.

Mr. Stark: Would you raise your right hand please and swear the testimony you are about to give in the present hearing to be the truth, whole truth and nothing but the truth, so help you God?

Witness: I do.

Mr. Stark: Have a seat, please.

ROBERT L. WILSON

Q. Would you state your full name and address and what your present occupation is? A. O.K. My name is Robert L. Wilson and I live at 2781 Hickory Trail in Snellville and I am the administrator of the Tax Assessors office.

Mr. Stark: O.K. Your Honor, we would like to tend into evidence the 1972 tax return and the 1973 tax return of Michelin Tire Corp.—uh—which I believe there's been no objections by the Counsel of the Plaintiff.

The Court: They've already been attached to that.

Mr. May: They're attached to the complaint and, and admitted, I believe.

Mr. Stark: Oh, O.K.

Mr. May: And we have no objection to the originals being admitted if they're, but they're already——

[Tr. 46] Mr. Stark: ——already attached——

Mr. May: ——in the record.

Mr. Stark: O.K. If they be in the record, your Honor, then we—uh—we'll go ahead, we'll go ahead and put them in as the original documents.

Q. Uh—would you state to the court just how the situation came about resulting in, the—uh—NOD returns on Michelin Tire Corp. for these two years, if you would try to? A. I have, I have of course been employed by Michelin, Michelin, by Gwinnett County for just a little over a year and whenever I come on the scene as I was going through the records to see what did exist, one I know that came to my attention that we had a corporation here listed quite a large amount of inventory, but then saying that it was not taxable and the county was not taxing. So I proceeded to try to find out why it wasn't taxed and I could never come up with anything concrete to—uh—

clear my mind and it is our duty to tax everybody fairly. I contacted Michelin that—uh—I did not quite understand this, I would like to talk with them and as this went along we did enter in the NOD's, which would in effect issue a tax bill for them for this inventory that they claimed was exempt.

Q. Now was there any change actually made in the tax return for 1972 or 1973? A. There were no changes made—uh—we issued—uh—in effect an extra tax bill.

Q. Uh—was this based on the fact that you disallowed the **[Tr. 47]** the exemption that they had claimed? A. Uh—yes, this would be it, we would be saying that they were taxable for it.

Q. Well, did you change any of the figures of the amount of their return actually the figures reflected on the return with this increase or decrease? A. We used exactly the—uh—same figures—uh—possible rounding off to the nearest zero.

Q. But the tax office did disallow their claimed exemption which resulted in an increase in tax for Michelin Tire Corp. and then this was then—uh—issued in the form of NOD, or not on Digest Tax Bills which are a part of the record? A. This is right, this whenever I, I contacted them—uh—whenever I, I believe I mis—, got Mr. Cain first. I wrote to a gentleman in New York by the name of Sobenie and he contacted me and said who the representatives here would be. I met with them,—uh—I told them what—uh—we were going to do and—uh—here we are.

Q. O.K. Uh—did you visit the—uh, uh—warehouse of Michelin Tire here in Gwinnett County? A. Uh—yes, sir. Shortly the letters were—uh—written I could be mistaken here, we might have gone to the warehouse first, but I remember it, we wrote the letter then went to the warehouse and talked to them.

Q. When you went to the warehouse did you examine the storeroom of goods there in the warehouse? A. We walked

through the warehouse, yes to examine the tubes and tires and that sort of thing. Walked among them.

[Tr. 48] Q. Were there any of them in cartons or boxes—uh—at that time when you went through the warehouse? A. No, the tires have always been stacked on the wooden pallets.

Q. In individual piles? A. Yes, several tires to each pile.

Q. O.K. And did you observe the tubes also? A. Uh—yes in fact as you come out of the warehouse, or come out of the office area into the warehouse there are in a sense almost directly in front of you.

Q. O.K. Were the arrangements in the warehouse basically or substantially the way Mr. Stone testified, as how they were arranged with, in the warehouse and their distribution throughout the warehouse? A. Yes. I've no fault with him.

Q. Is there any other thing that you think as far as the records is concerned that you observed, or in the warehouse that would be appropriate to put in the record? A. Uh—nothing much more that hasn't already been said, except you can see the tires there. Uh—you know that they are Michelin Tires. You do not know—uh—what van they came out of, or anything like this. You could not say they came in on a certain day, at least I couldn't, in a certain truck or Sea pack, whatever.

Mr. Stark: O.K. No further questions.

Mr. May: We have no questions.

The Court: Anything further?

Mr. Stark: Nothing further, your Honor.

Mr. May: We close your Honor.

Mr. Stark: We close, your Honor.

[Tr. 49] The Court: Do you wish to argue the matter? He has . . .

Mr. Stark: He has the brief, your Honor.

The Court . . . to give you a course of opportunity to reply by brief if you would like.

Mr. Stark: If we could, your Honor, it's a little technical. The trouble is there . . .

The Court: Do you want to supplement your brief from any thing that come out in the record today, Mr. May? I'll be glad for you to do it, sir.

Mr. Stark: If we would go ahead and transcribe the records and give me just a few days. I'll just transcribe the only item I've got here as this—is still a little research on it due to the fact that we don't have—uh you're dealing with foreign jurisdiction here and trying to get a little information on it, uh—if they would go ahead and prepare a record, then give me just a few days thereafter, I'll be glad to file a brief so it can be——

The Court: Suppose you get your record out, Mr. Upton, and at your convenience I know it'll be as soon as you can.

Reporter: Yes, sir.

The Court: And—uh—I'll assume each side wants a copy, wants a copy of the record.

Mr. Stark: Yes, sir, your Honor. I would like to have a copy of the record.

Mr. May: Yes, sir.

The Court: Upon the receipt of the record gentlemen, suppose we say 10 or 15, 30 days, whatever.

Mr. Stark: 15 should be sufficient, your Honor.

The Court: 15 days after the record is completed.

Mr. Stark: He already has a brief filed, so really I'll just be a reply to his and based on what we have in the record **[Tr. 50]** today. We didn't have all the——

The Court: Alright, suppose after the record received, Mr. Stark. You take 15 days to make whatever brief you want to, serve Mr. May with a copy of it and if you want a reply you better have it in 10 to 15 days, of . . .

Mr. May: . . . 10 will be plenty, your Honor.

The Court: 10 days, alright.

Mr. May: After receiving his——

The Court: Yes, sir. Let's sort of proceed in that order then.

Mr. May: Alright, sir. Thank you, your Honor.

(This concludes this hearing.)

[Tr. 51] In the Superior Court of Gwinnett County
State of Georgia

(Title Omitted in Printing)

EXHIBIT P-1

AFFIDAVIT OF ROLAND A. LACROIX

State of New York
County of

Personally appeared before the undersigned officer Roland A. Lacroix who, after first being duly sworn, deposes and says on oath as follows:

1

This Affidavit is made to be submitted to the Superior Court of Gwinnett County, Georgia, as evidence on behalf of the plaintiff in the above-styled action, and all facts herein stated are within the personal knowledge of the affiant.

2

At all times material herein, affiant has been and is now the Administrative Manager of Michelin Tire Corporation and as such, has personal knowledge of the facts hereinafter stated.

3

Michelin Tire Corporation is a corporation organized and existing under the laws of the State of New York with its principal place of business in Lake Success, New York, and is authorized to and transacting business in Gwinnett County, Georgia, at 2169 Interstate 85, Norcross, Georgia.

4

Michelin Tire Corporation is engaged in the business of importing into the United States automobile and truck tires and tubes manufactured outside the United States and distribut- **[Tr. 52]** ing such tires and tubes through franchised tire dealers. As a part of such business, Michelin operates a distribution warehouse located in Gwinnett County, Georgia, and all tires and tubes which flow into such warehouse are imported by Michelin from the factories outside the United States in which such tires and tubes are manufactured, and subsequently flow out from the Gwinnett County warehouse to destinations scattered throughout six (6) southeastern states.

5

Michelin is required to pay to the United States of America a four per cent (4%) import duty on all of the tires and tubes which it imports from factories outside the United States, and said four per cent (4%) import duty was paid by Michelin on all of the imported tires and tubes located in the Gwinnett County warehouse on January 1, 1972 and January 1, 1973.

6

Approximately seventy-five per cent (75%) of the imported tires and tubes located in the Gwinnett County warehouse on January 1, 1972 and January 1, 1973 were transported from the factories outside the United States at which the same were manufactured to the Gwinnett County warehouse in vehicles commonly referred to as "seavan trailers," and the remaining twenty-five per cent (25%) were transported in over-the-road trailers.

7

Michelin Tire Corporation does not own or lease any of the "seavan trailers" or any of the over-the-road trailers in which said imported tires and tubes are transported, and all of such trailers are owned by the shipping companies who transport the imported tires and tubes.

8

As of January 1, 1972 and January 1, 1973, respectively, none of the imported tires and tubes located in the Gwinnett County warehouse were pledged or hypothecated by Michelin as security for any loan.

[Tr. 53] 9

Michelin Tire Corporation did not receive any notice of any correction or change made by the Tax Assessors of Gwinnett County, Georgia, in the 1972 personal property tax return filed by Michelin and did not know that its return had been changed by the Assessors until it received 1972 Gwinnett County Tax Bill No. 24559 from the Tax Commissioner of Gwinnett County, Georgia.

10

Michelin Tire Corporation did not receive any notice of any correction or change made by the Tax Assessors of Gwinnett County, Georgia, in the 1973 personal property tax return filed by Michelin and had no knowledge that any correction or change in its 1973 return was being considered by the Tax Assessors of Gwinnett County, Georgia, until it received a letter dated August 24, 1973 from Mr. Robert L. Wilson, Administrator of the Board of Tax Assessors of Gwinnett County, Georgia, requesting a meeting with representatives of Michelin for the purpose of discussing the validity of the inventory exemption claimed by Michelin in its 1973 return.

11

The NOD returns attached to the plaintiff's Complaint as Exhibits H and I, respectively, were filed by Mr. Robert L. Wilson, Administrator of the Board of Tax Assessors of Gwinnett County, Georgia, without the knowledge or consent of Michelin Tire Corporation, and Michelin has at no time authorized or ratified the filing of either of said return.

12

As of January 1, 1972, passenger tubes which had been removed from the original cartons and having a value of $633.92

were owned by Michelin Tire Corporation and located in its warehouse in Gwinnett County, Georgia. On January 1, 1973, passenger tubes which had been removed from the original cartons and having a value of $664.22 were owned by Michelin Tire Corporation and **[Tr. 54]** located in its warehouse in Gwinnett County, Georgia.

This 20th day of March, 1974.

/s/ ROLAND A. LACROIX

Sworn to and subscribed before me this 29th day of March, 1974.

/s/ ELLEN SUE BORAKOVE
Notary Public
New York
(Notarial Seal)

(Exhibits P-2, P-3, P-4, D-1, and court reporter's certificate omitted in printing.)

The opinion and judgment of the Superior Court of Gwinnett County, Georgia, are printed at pages A-1 through A-5 of the Appendix to Michelin's Petition for a Writ of Certiorari herein.

The opinion and judgment of the Supreme Court of Georgia, and that Court's order denying rehearing, are printed at pages A-6 through A-19 of the Appendix to Michelin's Petition for a Writ of Certiorari herein.

Supreme Court, U. S.
FILED
JUN 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,
Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Georgia

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In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Georgia

STATEMENT OF THE CASE

In addition to the recitals made by Petitioners it should be noted, [and as carefully pointed out in the decision of the Supreme Court of Georgia], that after the tires arrive at Petitioner's warehouse in Gwinnett County, Georgia, as to the sea vans and over-the-road trailers into which the tires were packed and sealed at the foreign factories

". . . each trailer or van load is unloaded and sorted so that the individual shipments are no longer separate

identifiable units. The tires are stacked on wooden pallets and stand in the warehouse, segregated by size and style, awaiting sale to retail dealers. The individual tires are not treated or altered in any manner.

* * * * * * * *

"All the tires and tubes in the Gwinnett warehouse are sold to franchised Michelin dealers in six southeastern states. There are 250 to 300 such dealers who submit their orders, and Michelin makes delivery by common carrier or on *a customer pickup basis. The orders* vary in size and *may be filled from any shipment from the manufacturer and from any pallet or carton,* depending upon the size and style ordered. No tires are sold directly to retail customers." [Emphasis supplied.]

QUESTION PRESENTED

Whether tires imported by Petitioner in bulk and without packaging, but which after arrival at its warehouse have been sorted and segregated as to size and style and stacked on wooden pallets with other tires in its warehouse so that the individual shipments are no longer separate and identifiable units, are nonetheless immune from local ad valorem taxes by reason of Article I, Section 10, Clause 2 of the Constitution of the United States?

REASONS FOR DENYING THE WRIT

I. The decision of the Supreme Court of Georgia is in accord with applicable decisions of this Court, and is supported by this Court's holding in *F. May & Co. v. New Orleans* (1900), 178 U.S. 496, 44 L.Ed. 1165, which clarified the earlier decision in *Brown v. Maryland* (1827), 25 U.S. [12 Wheat.] 419, 6 L.Ed. 678.

II. Any seeming conflicts in the holdings of the several State courts of last resort are predicated upon differing factual situations which must be resolved on an individual basis.

These will be discussed seriatim.

I

The Decision of the Supreme Court of Georgia Accords With Applicable Decisions of This Court.

In *Hooven & Allison Co. v. Evatt* (1945), 324 U.S. 652, 89 L.Ed. 1264, with respect to the immunity afforded imported goods by the Import Clause of the Constitution this Honorable Court held

> ". . . that immunity survives their arrival in this country and continues until they are [1] sold, [2] removed from the original package, or [3] put to the use for which they are imported. (cits.)" [Brackets supplied].

The decision of the Supreme Court of Georgia [Petition A-17] properly applies the foregoing to the facts here involved. We quote:

> "In the case at bar the entire Michelin tire inventory was unpackaged, and all shipments in the inventory were co-

mingled and stored by size and type to make the individual units immediately available for resale. We therefore hold that the tires, imported in bulk without packaging, which have been sorted, segregated by size and style, and co-mingled with other shipments have lost their status as 'imports' and are subject to taxation."

(a)

The original package test applies to bulk shipments

Whether the sea van and over-the-road containers are properly considered the "original package", as in *Volkswagen Pacific, Inc. v. City of Los Angeles,* 101 Cal. Rptr. 869, 496 P.2d 1237,[1] or a normal means of transportation available through common carriers as was done by the Supreme Court of Georgia in the instant case, is not of critical significance.

An early definition of "original package", and one which has been accepted by text writers[2] and the Courts[3] alike, was announced by the Supreme Court of Tennessee in *Austin v. State* (1898), 101 Tenn. 563, 575, 48 S.W. 305, 308 [affirmed 179 U.S. 343, 45 L.Ed. 224]

> "Speaking generally, we would say that an original package, as applied to interstate and international commerce, is a package, bundle or *aggregation of goods*, put up, in whatever form, covering, or receptacle, for transportation, and

[1] Substantial support exists for this view. *Texas Company v. Brown* (1922), 258 U.S. 466, 66 L.Ed. 721; *Mexican Petroleum Corporation v. City of South Portland,* 121 Me. 128, 115 A. 900, 26 ALR 965. *Annotation*: 26 ALR 971.

[2] *26 Am Jur 2d, Commerce §§ 45, 46; 15 CJS Commerce,* § 28, p. 493.

[3] *West Virginia & Maryland Gas Co. v. Towers,* 106 A. 265, 134 Md. 137.

> as a unit transported from one state or nation to another." [Emphasis supplied.]

In *F. May & Co. v. New Orleans* (1900), 178 U.S. 496, 44 L.Ed. 1165, this Honorable Court considered goods imported in boxes, cases or bales, and which had been removed therefrom. Said the Court:

> "Without further reference to authorities we state our conclusion to be that within the decision in *Brown v. Maryland* the boxes, cases or bales in which plaintiffs' goods were shipped were the original packages, and the goods imported by them lost their distinctive character as imports and became a part of the general mass of the property of Louisiana, and subject to local taxation as other property in that state, *the moment the boxes, cases, or bales in which they were shipped reached their destination for use or trade* and were opened and the separate packages therein exposed or offered for sale; consequently, the assessment in question was not in violation of the Constitution of the United States." [Emphasis supplied.]

Other language appearing in the decision clearly indicates the same result would have been reached had the individual items been removed from an "aggregation of goods." We quote (p. 508):

> "We have seen that the plaintiffs, in effect, contend that having paid the duties imposed by the United States they were entitled, without liability to taxation upon the goods as property, to open the boxes in which the separate parcels of goods were transported, and put such separate parcels in the hands of agents to be sold wherever, in the state or in the country, customers could be found. The separate parcels—such is the effect of the argument—are not to be deemed incorporated into the mass of the property of the state while thus being carried around the country by the

importer's agents,—no separate parcel, so long as it remained *in the particular form* in which it was packed in a box or case with other parcels, ceasing to have the character of an import until after it was sold by such agents. This proposition cannot be sustained. We cannot doubt that the goods when placed in the hands of agents for sale, *in separate parcels*, have been so acted upon by the importer that they have ceased to be imports, and have become part of the mass of the property of the state, liable to local taxation. But what is the difference in principle between the case of sales by an importer through traveling agents, and the case of an importer who opens the box or case in which his goods, wrapped in separate parcels, were imported, and by employees sells or offers to sell the separate parcels, either from the opened box or case in his store, or from shelves or counters upon which such parcels have been placed for examination and sale?" [Emphasis supplied.][4]

Petitioner's reliance upon the words "original form," appearing in *Brown v. Maryland*, supra, seems misplaced. The "original form" of some articles of commerce never changes. As noted in *E. J. Stanton & Sons v. Los Angeles County*, 78 Cal App 2d 181, 177 P.2d 804, cer den 322 U.S. 766, 92 L.Ed. 352, (p. 807):

> "Indeed such articles of commerce as steel beams, threshing machines, telegraph poles and many others might be cited as illustrative of classes of imports that are incapable of being wrapped in cellophane or encased in wooden or steel crates. Although they might arrive at the dock without cover, nevertheless a shipment of such articles constitutes the original form or the original package."

---

[4] Other decisions of this Honorable Court holding in accord are *Cook v. Marshall County*, 196 U.S. 261, 49 L.Ed. 471; *Purity Extract and Tonic Company v. Lynch*, 226 U.S. 192; 57 L.Ed. 184; *Price v. Illinois*, 238 U.S. 446, 59 L.Ed. 343.

While Petitioner's tires are capable of being wrapped or otherwise encased, the fact that they are not so done should not afford an immunity from local taxation. In short being circumferential in form and shape, the tires will retain this characteristic throughout their entire useful life.

II

Any Conflicts in State Court Decisions Result From Factual Determinations and Not From Failure to Recognize Legal Principles.

Reverting to *Brown v. Maryland*, supra, in the course of the opinion Chief Justice Marshall stated (p. 441):

> "The constitutional prohibition on the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on

imports to escape the prohibition in the constitution." pp. 442, 443.

The seeming conflict, if indeed conflict there be, between decisions of State Courts of last resort stem from differing factual situations and findings of fact made as to activity of the importers with reference to the particular goods involved. Without particular exception all such decisions refer to *Brown v. Maryland*, supra, as well as other decisions of this Honorable Court.

For example, in *E.J. Stanton & Sons v. Los Angeles County*, 78 Cal App 2d 181, 177 P.2d 804, cer den 332 U.S. 766, 92 L.Ed. 352, supra, the California Appeals Court pinpointed the issue for decision thus:

> "The question involved is whether respondent as importer had so treated certain taxed lumber as to incorporate it into the mass of property in this state thereby removing it from the inhibition of the federal constitution against a state's assessing duties on imports."

Whether the phraseology utilized in the opinion "surrounded by the invisible gossamer woven of law, custom and convention" is so much rhetoric and subject to the criticism leveled against it by Petitioner, it nonetheless squares with this Honorable Court's statement in *F. May & Company v. New Orleans*, supra, that imported goods become subject to local taxation "the *moment* the boxes, cases, or bales in which they were shipped reached their destination for use or trade, . . ." [Emphasis supplied.]

A mere casual reading of *American Mannex Corporation v. Cronvich*, 251 La. 1014, 207 So.2d 778, reveals that commingling of steel casings was involved, and the case went off on its particular facts.

Florida Greenheart Corporation v. Gautier, 172 So.2d 589, cer den 382 U.S. 825, 15 L.Ed. 2d 70, was by a divided court the cleavage in thought resulting from differing views of the facts

presented. The majority equated the facts with an earlier decision of the Florida Court involving canned meats imported from Europe and stored in the original unbroken cases, *Overstreet v. Frederick B. Cooper Co.*, 134 So. 2d 225.[5] The dissenting judges viewed the factual situation in different perspective.

Citroen Cars Corporation v. City of New York, 30 N.Y. 2d 300, 283 N.E.2d 758, is also a factually oriented decision since the opinion discloses, as in the instant case, a portion of the inventory was determined to be taxable. The following statement is significant (p. 761):

> "As with the original package doctrine a line must be drawn, sometimes arbitrarily, beyond which the immunity will not extend. (cit)"

The same is true of *Columbus Steel Supply Co. v. Kosydar*, 38 Ohio St 2d 258, 313 N.E.2d 389, not cited by Petitioner. Steel pipe purchased from foreign suppliers was assessed for local taxation. Upon arrival at the storage yard the pipe was hoisted from the transport vehicles by means of a crane, placed on skids, and sorted according to outside-diameter size, wall thickness, and whether plain or threaded-and-coupled ends.

After reviewing *Brown v. Maryland*, supra, *F. May & Co. v. New Orleans*, supra, and *Austin v. State*, supra, the Court stated most significantly (p. 393):

> "We conclude, therefore, that the 'original package' involved in this case was the commercial unit of importation. Applying that principle to the facts of this case, it is our opinion that each item of pipe which arrived in a shipment was an integral part of the aggregate which composed the commercial unit, and that when an item of pipe was separated from the commercial unit, or was sorted or segregated

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[5] The *Overstreet case* obviously involved facts exactly parallel to those in *Low v. Austin* (1871), 80 U.S. (13 Wall.) 29, 20 L.Ed. 517, and therefore of ready solution.

from other items comprising the commercial unit, the original package was broken or 'opened'.

We recognize that the case law which embodies the original package doctrine has established a general focus of inquiry which, in the final analysis, requires an evidentiary determination that the actions of the importer upon the imported items caused a cessation of the tax immunity." [Emphasis supplied.]

Review by writ of certiorari has been declined in at least three instances and, while Respondents freely acknowledge such denial is not stare decisis, the grant of certiorari in the instant case will not achieve the result argued for by Petitioner. Activities of importers are complex, the goods imported are varied in physical characteristics, the handling of same by the importers after their arrival are lacking in uniformity and of necessity will continue so. The statement of Mr. Chief Justice Marshall in *Brown v. Maryland*, supra, is no less true today than when originally uttered:

". . . the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application."

Respondents respectfully submit the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted

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OCTOBER TERM, 1974

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This Reply Brief is addressed to arguments first raised in the Respondents' Brief in Opposition to the granting of certiorari.

1. **The Respondents' Argument That the Decision Below Accords With Applicable Decisions of This Court.**

The decision of the Supreme Court of Georgia ignores, disregards, and refuses to follow and apply, the "original form"

doctrine which, along with the "original package" doctrine, had its origin in *Brown v. Maryland*, 25 U.S. 419 (1827), as shown at pages 5-7 of Michelin's Petition for a Writ of Certiorari.

The Respondents, in their Brief, do not cite any decision of this Court which questions the existence and soundness of such "original form" doctrine.

In *Hooven and Allison Company v. Evatt*, 324 U.S. 652 (1945), which is the most recent decision of this Court cited and relied upon by the Respondents, the Court, at 666, reaffirmed the "original form" doctrine by quoting with approval from an earlier decision the statement that: "Indeed, goods imported, while they remain in the hands of the importer, in the *form and shape* in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of state government." (Emphasis supplied.)

The "form and shape" of a tire which is imported without packaging is not changed in any way by stacking such tire in the importer's warehouse with other imported tires of the same size and style.

May v. New Orleans, 178 U.S. 496 (1900), cited and relied upon by the Respondents, holds that where a shipping carton containing smaller packages of imported goods is broken by the importer, the breaking of such "original package" shipping carton results in loss of immunity from local taxation. The decision is completely silent with respect to goods imported without packaging, and lends no support whatsoever to Respondents' contention that, where goods are imported without packaging, the entire shipment is an "invisible gossamer" original package.

In no decision has this Court ever given the slightest indication that, where unpackaged imports are involved, the entire

shipment is to be regarded as being an "invisible gossamer" original package.

The Respondents are mistaken in their contention that the imported tires have been put to the use for which they were imported. Michelin imports the tires for the sole purpose of selling them, and not for its own use in manufacturing or otherwise. In *Youngstown Sheet and Tube Company v. Bowers*, 358 U.S. 534 (1959), the Court, at 540-541, recognizes that where goods are brought into this country by an importer "for his own use", as for example in manufacturing, they become taxable when they are so "used" by such importer, but that where goods are imported for the purpose of selling them, the importer acquires, by payment of the duty to the United States, "the right to dispose of his merchandise, as well as to bring it into the country . . .".

Where packaged imports are still in the "original package" in which imported, stacking such packaged imports in the importer's warehouse, along with other packaged imports of the same size and style, does not result in loss of immunity from local taxation.

In like manner, where unpackaged imports are still in the "original form" in which imported, stacking such unpackaged imports in the importer's warehouse, along with other unpackaged imports of the same size and style, does not result in loss of immunity from local taxation.

The foregoing is especially true where, as here, all of the imported goods, both packaged and unpackaged, flow out from the importer's warehouse to franchised tire dealers scattered throughout six states, and it is such franchised tire dealers who sell the imported tires and tubes for local consumption at the point of final destination. Petition for a Writ of Certiorari, pages 7-8.

The Supreme Court of Georgia refused to recognize and apply the "original form" doctrine established by decisions of this Court. It refused to recognize, as required by decisions of this Court, that the imported tires, while in Michelin's warehouse, are still in the flow of import distribution, and are still imports. Its decision clearly is not in accord with decisions of this Court.

2. **The Respondents' Argument That Any Conflicts in State Court Decisions Result From Factual Determinations and Not From Failure to Recognize Legal Principles.**

Where goods imported without packaging are involved, the courts of New York, North Carolina and Florida recognize and give effect to the "original form" doctrine as established by the *Brown v. Maryland* line of decisions, whereas the courts of California, Louisiana, and now Georgia, ignore, disregard, and refuse to follow and apply, such "original form" doctrine. Petition for a Writ of Certiorari, pages 8-9.

Whether or not such "original form" doctrine should be recognized and given effect where goods are imported without packaging is a question of law. The conflict in state court decisions is a conflict with regard to such question of law.

Such question of law, as to which there is substantial conflict in state court decisions, involves a federal constitutional issue of wide import, the resolution of which will have immediate importance far beyond the particular facts and parties involved in this case.

3. **The Respondents' Hinted Suggestion That Vehicles of Transportation Should Perhaps Be Considered as Being "Original Packages".**

Treating vehicles of transportation as being "original packages" would do violence to the normal and ordinary meaning of

the word "package", and would wipe out completely all immunity of imported goods from local taxation because in every case the imported goods must necessarily be brought into this country in some vehicle of transportation.

Such a result cannot be reconciled with *Brown v. Maryland* and other decisions discussed in Michelin's Petition for a Writ of Certiorari.

In their statement of the Question Presented, Brief page 2, the Respondents correctly recognize and concede that the tires are imported by Michelin "without packaging".

CONCLUSION

Wherefore, Michelin respectfully prays that its Petition for a Writ of Certiorari be granted.

Respectfully submitted

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 233 Ga. 712, 214 S.E.2d 349. Such opinion, and the order of the Supreme Court of Georgia denying the motion for rehearing which was filed by Michelin Tire Corporation (hereinafter "Michelin"), are printed at pages A-6 through A-19 of the Appendix to Michelin's Petition for a Writ of Certiorari.

JURISDICTION

The opinion of the Supreme Court of Georiga was rendered on February 4, 1975, and became final, for purposes of review by this Court, when the Supreme Court of Georgia denied Michelin's timely motion for rehearing on February 18, 1975. Michelin's Petition for a Writ of Certiorari was filed May 7, 1975 and was granted June 23, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether tires imported by Michelin without packaging, and held for sale by Michelin in its wholesale distribution warehouse, in the original form in which such tires were imported, are immune under the Import Clause of the Federal Constitution from local ad valorem property taxes.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Import Clause (Article I, Section 10, Clause 2) of the Constitution of the United States, which states in part: "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws; . . ."

STATEMENT OF THE CASE

Michelin filed in the Superior Court of Gwinnett County, Georgia, this action seeking to enjoin the tax officials of that County (hereinafter "tax officials") from assessing and collecting Gwinnett County ad valorem property taxes on inventories of imported tires and tubes in Michelin's Gwinnett County warehouse. (A. 1-13).

In its original complaint, Michelin contended that such taxation is prohibited by the Import Clause of the Federal Constitution. (A. 4).

The case was tried in the Superior Court of Gwinnett County, and such Court rendered its decision in favor of Michelin. (The opinion and judgment of such Court are printed at pages A-1 through A-5 of the Appendix to Michelin's Petition for a Writ of Certiorari).

The tax officials appealed to the Supreme Court of Georgia, which upheld the immunity from tax with respect to imported tubes held in Michelin's Gwinnett County warehouse in the original packages in which imported, but denied immunity from tax with respect to tires imported without packaging, notwithstanding the fact that such tires were held by Michelin in its Gwinnett County warehouse in the original form in which they were imported. (The opinion and judgment of the Supreme Court of Georgia are printed at pages A-6 through A-18 of the Appendix to Michelin's Petition for a Writ of Certiorari).

Michelin, a New York corporation, is an importer and wholesale distributor of automobile and truck tires and tubes manufactured outside of the United States. (A. 26, 29, 53-54).

On all of such imported tires and tubes, Michelin has paid to the United States a 4% import duty. (A. 26-27).

No sales of such imported tires and tubes are made by Michelin except to franchised dealers. (A. 53-54). None of such imported tires or tubes is sold by Michelin to retail customers. (A. 53-54).

As a part of its business, Michelin operates a wholesale distribution warehouse located in Gwinnett County, Georgia. (A. 26, 29, 53-54).

Tires and tubes imported by Michelin from abroad flow into such Gwinnett County warehouse, and flow out from such Gwinnett County warehouse to some 250 to 300 franchised tire dealers scattered throughout six states. (A. 26, 29, 53-54).

All of the imported tires are imported by Michelin without packaging. (A. 31, 34). All of such unpackaged imported tires are held by Michelin in its Gwinnett County warehouse in the original form in which they were imported, and none of such tires are altered or modified in any way from the original form in which they were imported. (A. 34-35). Each imported tire bears a separate serial number which distinguishes it from any other tire. (A. 31).

While awaiting shipment or delivery to franchised tire dealers, the imported tires are segregated by size and style, and are stacked with other imported tires of the same size and style, in Michelin's wholesale distribution warehouse. (A. 29, 34-35, 46-47). Shipments and deliveries of such imported tires to franchised tire dealers, from such warehouse, average somewhere around 4,000 to 5,000 pounds of tires per shipment or delivery. (A. 53-54). The only tires in the warehouse are imported tires. (A. 55).

In its complaint, as amended, Michelin showed that it was not contesting, and had paid, the amount of Gwinnett County ad valorem property taxes due with respect to a small amount of passenger tubes located in Michelin's Gwinnett County warehouse which were partly (a) passenger tubes made in the United States, and partly (b) imported passenger tubes as to which the original package shipping carton in which such passenger tubes were imported had been broken by Michelin. (A. 10-11, 19-20). The passenger tubes referred to in the preceding sentence were kept separate from, and were not commingled with, the imported tires and tubes as to which Michelin claims immunity from local taxation. (A. 35-39).

Most of the imported tubes in the warehouse were still in the original package shipping carton in which such tubes were imported. (A. 28, 35-36). The Supreme Court of Georgia held that such tubes are immune from Gwinnett County ad valorem property taxation. (Page A-18 of Appendix to Michelin's Petition for a Writ of Certiorari). The tax officials did not file a Cross Petition for a Writ of Certiorari with respect to such holding.

The Supreme Court of Georgia based its decision with respect to the imported tires on the ground that such tires lost their status as imports when they were segregated by size and style, and stacked with other imported tires of the same size and style, in Michelin's Gwinnett County warehouse. (Pages A-17 and A-18 of Appendix to Michelin's Petition for a Writ of Certiorari).

The Supreme Court of Georgia recognized that the imported tires were held by Michelin in its Gwinnett County warehouse in the original form in which they were imported. In its opinion it said: "The individual tires are not treated or altered in any manner." (Page A-7 of Appendix to Michelin's Petition for a Writ of Certiorari).

SUMMARY OF ARGUMENT

The imported tires, which are held by Michelin in its warehouse in the "original form" in which they were imported, are immune from local taxation under the "original form or package" doctrine which is established by decisions of this Court beginning with *Brown v. Maryland*, 12 Wheat. 419 (1827).

Such imported tires, while in Michelin's warehouse, are still in the flow of import distribution, and are still imports, be-

cause such tires flow out from such warehouse to franchised tire dealers scattered throughout six states, and it is such franchised tire dealers who sell the tires for local consumption at the point of final destination.

By payment of the 4% import duty to the United States, Michelin acquired the right to sell such imported tires in the "original form" in which they were imported, without becoming subject to local taxation.

Segregating the imported tires by size and style, and stacking them in Michelin's warehouse with other imported tires of the same size and style, does not change the "original form" in which each tire was imported, and does not alter the fact that such tires flow out to franchised tire dealers scattered throughout six states and it is such franchised tire dealers who sell the tires for local consumption at the point of final destination.

The argument that each "entire shipment" of unpackaged imported goods is an "invisible" original package, which is broken when any single item is removed from the shipment, ignores and disregards the "original form" portion of the "original form or package" doctrine. Michelin's failure to keep each entire shipment of imported tires physically together in one place does not alter the fact that such tires flow out to franchised tire dealers scattered throughout six states and it is such franchised tire dealers who sell the tires for local consumption at the point of final destination.

The Supreme Court of Georgia correctly rejected the tax officials' argument that an ad valorem tax is not a tax on imports, and correctly rejected their argument that sea van trailers in which some of the tires and tubes were shipped were "original packages."

ARGUMENT

A. Under the "Original Form or Package" Doctrine Which Has Long Been Established by Decisions of This Court, the Imported Tires, Which Are Held by Michelin in Its Warehouse in the "Original Form" in Which Such Tires Were Imported, Are Immune From Local Taxation.

It has long been established by decisions of this Court that imported goods are immune from local taxation while held by the importer, in his warehouse, in the "original form or package" in which such goods were imported.

In *Brown v. Maryland*, 12 Wheat. 419 (1827), the Court, at 441-442, recognized that at some point "the thing imported" ceases to be an import, but went on to hold, in a passage which is quoted in almost every subsequent decision involving the Import Clause, that "while remaining the property of the importer, in his warehouse, in the *original form or package* in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." (Emphasis supplied).

In *Hooven and Allison Company v. Evatt*, 324 U.S. 652 (1945), the Court, at 666, said "we now affirm" that: "Indeed, goods imported, while they remain in the hands of the importer, in the *form and shape* in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of state government." (Emphasis supplied).

In many other decisions extending over nearly 150 years, this Court has expressed its approval of the "original form or package" doctrine established by the landmark decision in *Brown v. Maryland*. Such decisions include *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218 (1933); *Youngs-*

town Sheet and Tube Company v. Bowers, 358 U.S. 534 (1959); and *Department of Revenue v. Beam Distilling Co.*, 377 U.S. 341 (1964).

In the passage often quoted from *Brown v. Maryland*, Chief Justice Marshall, at 12 Wheat. 441-442, said that if "the thing imported" is held by the importer, in his warehouse, in the "original form or package" in which it was imported, it is immune from local taxation.

The plain and natural meaning of such language is that if "the thing imported" was imported in a package, it must remain in the "original package" in which it was imported in order to be immune from local taxation, or, if "the thing imported" was imported without packaging, it must remain in the "original form" in which it was imported in order to be immune from local taxation.

In *Florida Greenheart Corporation v. Gautier*, Fla. (1965), 172 So.2d 589, cert. den. 382 U.S. 825, the Supreme Court of Florida held that lumber imported without packaging was immune from local taxation where held for sale by the importer in the "original form" in which imported. The Florida Court, at 591-592, after referring to the term "original package," said: "Where this expression has been used in the cases, *it has been used in juxtaposition with the words 'original form.'* This was the language used more than 100 years ago in the early case of *Brown v. State of Maryland* by Justice Marshall, 12 Wheat. 419, 25 U.S. 419, 6 L. Ed. 678. The cases since have held that the exemption attaches to the sale *in the original form or in the original package.*" (Emphasis supplied).

In *Citreon Cars Corporation v. City of New York*, 30 N.Y. 2d 300 (1972), 382 N.E.2d 758, the Court of Appeals of New York held that an automobile, imported without packaging, is immune under the Import Clause of the Federal Constitution from local taxation so long as owned and held for sale by the importer, where no substantial physical change has

been made in such automobile from the form in which it was imported. In the Court's opinion, after discussing *Brown v. Maryland*, Judge Breitel, at 30 N.Y.2d 305, said: "At least, two points were made clear by the *Brown* decision. First, one who imports for sale has by payment of the customs duty acquired the right to sell the goods free from State taxation. Certainly this is true so long as the article remains in the importer's warehouse in the *form or package* in which it was imported." (Emphasis supplied).

In *Wilson v. County of Wake*, N.C. App. (1973), 199 S.E. 2d 665, the Court held that undercarriage parts for crawler-type vehicles, imported without packaging, and held by the importer for sale in the "original form or condition" in which they were imported, are immune under the Import Clause of the Federal Constitution from local ad valorem property taxation.

It is an undisputed fact that the imported tires were held by Michelin in the "original form" in which such tires were imported. (A. 34-35).

Under the "original form or package" doctrine, such "original form" imported tires were immune from local taxation.

The Supreme Court of Georgia does not discuss the "original form" portion of the "original form or package" doctrine. It simply disregards and ignores the words "original form", and in effect treats such words as having no meaning at all.

B. The Imported Tires Flow Out From Michelin's Warehouse to Franchised Tire Dealers Scattered Throughout Six States, and Therefore, While in Such Warehouse, Are Still in the Flow of Import Distribution, and Are Still Imports.

In *Youngstown Sheet and Tube Company v. Bowers*, 358 U.S. 534 (1959), the Court, at 546, held that goods imported

for use in manufacturing had ceased to be imports and had become subject to local taxation where the "importation journey definitely had ended" and the goods were irrevocably committed to use in manufacturing at the "point of final destination."

By contrast, the imported tires here in question flow out from Michelin's Gwinnett County warehouse to franchised tire dealers scattered throughout six states, and therefore cannot reasonably be considered, while in such warehouse, as having reached the point where their "importation journey definitely had ended" or as having come to rest at a "point of final destination."

In language which the Court quoted with approval in *Youngstown*, supra, at 540, footnote 6, the imported tires, while in the Gwinnett County warehouse, are "merely in transitu, and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported."

In *Standard-Triumph Motor Company, Inc. v. City of Houston*, 220 F. Supp. 732 (S.D. Tex. 1963), judgment vacated on jurisdictional grounds, 347 F.2d 194, cert den 382 U.S. 974, the District Court correctly held that unpackaged imported automobiles were "still in transit", and were still imports, where "the importation of these vehicles was for the purpose of distributing them to dealers throughout a five state area where they would then be sold and operated." 220 F. Supp. 734.

One of the important reasons for the inclusion in the Federal Constitution of the Import Clause was the desire to prevent the seaboard states from levying taxes on goods flowing through to inland states. 2 Farrand, Records of the Federal Convention (1911), 441, 442. The purpose just referred to would be defeated by permitting Gwinnett County to impose an ad valorem property tax on the imported tires which flow through the Gwinnett County warehouse to franchised tire dealers scattered throughout six states.

C. By Payment of the 4% Duty to the United States, Michelin Acquired the Right to Sell the Imported Tires, as Well as to Bring Them Into the Country, Without Becoming Subject to Local Taxation.

In *Youngstown Sheet and Tube Company v. Bowers*, 358 U.S. 534 (1959), the Court, at 540, quoted with approval from *Brown v. Maryland* the statement that one who had imported goods for the purpose of selling them, had, "by payment of the duty to the United States, (acquired the) right to dispose of his merchandise, as well as to bring it into the country," and that the State could not tax it "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported."

On all of the imported tires, Michelin has paid a 4% import duty to the United States. (A. 26, 27).

Under the language from *Youngstown* quoted above, Michelin, by payment of such 4% import duty, acquired the right to sell the imported tires, as well as to bring them into the country, and a State cannot tax such imported tires while remaining the property of Michelin, in its warehouse, in the "original form or package" in which they were imported.

The tax officials are mistaken in their contention, which they claim is supported by this Court's decision in *Youngstown*, that Michelin, by offering the imported tires for sale, has put such tires to the use for which they were imported, with resulting loss of immunity from local taxation.

Youngstown involved goods brought into this country by an importer for its own use in manufacturing. The Court holds that such imported goods become taxable when they are used by the importer in manufacturing, in which event, as the Court noted, they have been put to the use for which they were imported. The Court further holds that the imported goods are being used

in manufacturing when they are required to be kept on hand to meet the current operational needs of the manufacturer who imported them.

With respect to the entirely different situation involving goods imported for the purpose of selling them, there is no suggestion in *Youngstown* that the importer would become taxable by reason of offering such imported goods for sale. On the contrary, the Court clearly recognizes, as shown above, that where goods are imported for the purpose of selling them, the importer acquires, by payment of the import duty to the United States, the right to sell the imported goods in the original form or package in which they were imported, as well as to bring them into the country, without becoming subject to local taxation.

May v. New Orleans, 178 U.S. 496 (1900), cited and relied upon by the tax officials, holds that where a shipping box, case or bale containing smaller packages of imported goods is broken by the importer, the breaking of such shipping box, case or bale results in loss of immunity from local taxation. The Court holds that the shipping boxes, cases or bales, and not the smaller packages contained therein, are the "original packages" for the purpose of applying the *Brown v. Maryland* doctrine. The decision does not hold or suggest, as mistakenly argued by the tax officials, that the offering for sale of imported goods, which are still in the "original form or package" in which they were imported, would result in loss of immunity from local taxation.

If, in addition to bearing the burden of the 4% import duty, Michelin were required to pay ad valorem property taxes to Gwinnett County, it would be at a severe disadvantage as compared with wholesale distributors of tires made in this country, who are not subject to such 4% import duty. It is therefore reasonable and proper that Michelin, by payment of such 4% import duty, acquires the right not only to bring the tires into the country but also the right to sell them in the original form in which they were imported, free of local taxation.

D. Stacking Unpackaged Imported Tires by Size and Style in Michelin's Warehouse Does Not Change the "Original Form" in Which Each Tire Is Imported, and Cannot Reasonably Be Considered as Indicating That Such Tires Have Completed Their Import Journey or That Michelin Is Selling Such Goods for Local Consumption at the Point of Final Destination.

As previously mentioned, the tires imported by Michelin without packaging are not treated or altered in any manner and remain in their "original form" while in the distribution warehouse. Given this fact, both logic and common sense rebel at the suggestion that the "original form" of a tire imported without packaging is somehow changed by the mere stacking of such a tire in a warehouse with other unpackaged imported tires of the same size and style.

Such an argument was rejected in the *Florida Greenheart* and *Wilson* decisions discussed under heading A above, wherein the courts of Florida and North Carolina correctly held that stacking unpackaged imports with other unpackaged imports of the same size and style does not result in the loss of immunity from local taxation, so long as each unpackaged article is kept in the "original form" in which it was imported.

This is precisely the situation revealed by the record in this case, and the holding of the Supreme Court of Georgia to the contrary is erroneous because it completely disregards, ignores and treats as being meaningless, the "original form" portion of the "original form or package" doctrine.

The Supreme Court of Georiga is likewise mistaken in suggesting that segregating and stacking the imported tires by size and style in Michelin's warehouse is an activity comparable to that of the "itinerant peddler" referred to in *Brown v. Maryland*.

(Page A-17 of Appendix to Michelin's Petition for a Writ of Certiorari). The itinerant peddler is assumed to have broken the "original packages" in which the goods were imported, whereas Michelin holds the imported tires in the "original form" in which they were imported. An itinerant peddler sells goods at retail, whereas Michelin sells the imported tires only at wholesale, in shipments or deliveries averaging around 4,000 to 5,000 pounds of tires per shipment or delivery. (A. 53-54). An itinerant peddler sells goods for local consumption at the point of final destination, whereas the imported tires flow out from Michelin's warehouse to franchised tire dealers scattered throughout six states, and it is such franchised tire dealers who sell the tires for local consumption at the point of final destination. (A. 53-54).

Michelin does not operate a retail tire store. It does not sell the imported tires for local consumption at the point of final destination. It is exclusively a wholesale distributor of such tires, and such tires flow out from its wholesale distribution warehouse, in wholesale size shipments or deliveries, to destinations scattered throughout six states. (A. 53-54).

Segregating the imported tires by size and style, and stacking them with other imported tires of the same size and style in Michelin's Gwinnett County wholesale distribution warehouse, neither changes the "original form" of such tires nor alters in any way the fact that such imported tires, while in such warehouse, have not completed their import journey; have not come to rest at a final destination in Gwinnett County; are not being sold by Michelin for local consumption at the point of final destination; are still in the flow of wholesale import distribution; and are still imports.

E. The "Invisible" Package Argument Disregards and Ignores the "Original Form" Portion of the "Original Form or Package" Doctrine, Is Unrealistic and Should Be Rejected.

In what is obviously an effort to avoid the impact of the "original form" portion of the "original form or package" doctrine established by decisions of this Court, the courts of several states have held that, where unpackaged imports are involved, each entire shipment of unpackaged imported goods should be considered as being an "invisible" original package, which is broken when any single item is removed from the shipment, even though all items contained in the shipment are still in the "original form" in which they were imported. *E. J. Stanton & Sons v. Los Angeles County*, Cal App. (1947), 177 P.2d 804, cert den 322 U.S. 766; *American Mannex Corp. v. Cronvich*, La. (1968), 207 So.2d 778; *Columbus Steel Supply Co. v. Kosydar*, 38 Ohio St.2d 258 (1974), 313 N.E.2d 389.

In *Stanton*, the court, at 177 P.2d 808, referred to the entire shipment as being an "invisible gossamer" package.

Each "entire shipment" of tires received by Michelin at its warehouse consists of around 23,000 to 25,000 pounds of tires. (A. 54). Under the state court decisions just referred to, each such shipment would be considered as being an "invisible gossamer" package containing around 11½ to 12½ tons of tires. We respectfully submit that such view is strained and farfetched that it disregards and ignores the "original form" portion of the "original form or package" doctrine, and that it does not provide any reasonable basis for deciding the issue of whether or not the imported tires, while held for sale by Michelin in its wholesale distribution warehouse, have completed their import journey and have ceased to be imports.

Austin v. Tennessee, 179 U.S. 343 (1900), cited and relied upon by the tax officials, involved paper packages of cigarettes,

each 3 inches in length and 1½ inches in width, which were shipped in a basket furnished by an express company. The Court holds that, if there is any "original package" in the shipment, it is the basket and not the small paper packages of cigarettes contained therein. The decision does not hold or suggest, as mistakenly argued by the tax officials, that the entire shipment of goods is an "original package".

In the instant case the tires are imported without packaging and there is no original package—visible or invisible. The fact that Michelin does not keep each entire shipment of imported tires physically together in one place in its Gwinnett County wholesale distribution warehouse does not and cannot create an original package where none exists. If it can, every shipment of goods imported without packaging is surrounded by a so-called "invisible gossamer" package which is broken when any single item is removed, and the "original form" portion of the "original form or package" doctrine is rendered absolutely meaningless.

Furthermore, the fact that Michelin does not keep each entire shipment of imported tires physically together in one place in the warehouse does not and cannot alter the fact that such tires, while in such warehouse, have not completed their import journey; have not come to rest at a final destination in Gwinnett County; are not being sold by Michelin for local consumption at the point of final destination; are still in the flow of import distribution; and are still imports.

Under these circumstances, we respectfully submit that the "invisible" package argument ignores the plain and unambiguous language of the *Brown v. Maryland* line of decisions, is totally unrealistic, and should be rejected.

F. The Immunity of Imports From Local Taxation Includes Immunity From Local Ad Valorem Property Taxation.

The Supreme Court of Georgia correctly rejected the tax officials' argument that an annual ad valorem tax is not a tax on imports within the meaning of the Import Clause of the Federal Constitution. (Page A-17 of Appendix to Michelin's Petition for a Writ of Certiorari).

The argument that a non-discriminatory property tax on imported goods is not prohibited by the Import Clause of the Federal Constitution was considered and rejected by the Court in *Low v. Austin* 13 Wall. 29 (1872). The Court, at 13 Wall. 34, held that: "Whilst retaining their character as imports, a tax upon them in any shape, is within the constitutional prohibition."

In *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69 (1946), the Court again rejected the contention that the Import-Export Cluase should be read as not prohibiting a non-discriminatory local tax. The Court, at 76, said: "It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection laws.' The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax prohibition aginst 'any discriminatory' tax."

In *Department of Revenue v. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court held that imported whisky was immune under the Import Clause from a Kentucky tax of 10¢ per proof gallon which, although an occupational or license tax in form, was held to be a tax on the imported whisky. The Court, at

343, said: "The tax here in question is clearly of a kind prohibited by the Export-Import Clause. *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678. As this Court stated alomst a century ago in *Low v. Austin*, 13 Wall. 29, 20 L. Ed. 517, a case involving a California ad valorem tax on wine imported from France and stored in original cases in a San Francisco warehouse, 'the goods imported do not lose their character as imports, . . . until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition.'"

G. The Sea Van Trailers in Which Some of the Imported Tires and Tubes Are Shipped Are Vehicles of Transportation and Not "Original Packages."

The Supreme Court of Georgia correctly rejected the tax officials' argument that the sea van trailers are "original packages". (Page A-17 of Appendix to Michelin's Petition for a Writ of Certiorari).

The sea van trailers are vehicles of transportation, and cannot be considered as being "packages" without doing violence to the ordinary and everyday meaning of the word "package".

Such sea van trailers are close to 40 feet in length, and each sea van trailer is the trailer portion of a large tractor-trailer rig, with the wheels and chassis of the sea van trailer being removable so that the sea van trailers can be stacked one upon another in a ship. (A. 32-33, 43-44). Each sea van trailer carries around 11½ to 12½ tons of tires. (A. 54). All of the sea van trailers are owned by the shipping companies which transport the imported tires and tubes. (A. 27).

When a sea van trailer is attached to the wheels and chassis, and to a tractor, a casual observer would not observe any difference between such sea van tractor-trailer rig and the normal type of large tractor-trailer rig which does not have the sea van trailer feature of the wheels and chassis being removable to facilitate stacking in a ship. The fact that there is no observable difference between the two types of tractor-trailer rigs is shown by the photographs identified as Ex. P-3 (sea van trailers) and Ex. P-4 (ordinary trailers). (R. 155; A. 31-33).

In *Michigan State Tax Commission v. Garment Corporation of America*, 32 Mich. App. 715 (1971), 189 N.W.2d 72, cert. den. 404 U.S. 992, the Michigan Court rejected a contention that sea van trailers are "original packages" for the purpose of the Import Clause of the Federal Constitution, and said, at 189 N.W.2d 74: "There is no essential difference between these vans and vehicles which are normally used in over-the-road transportation of property; the only slight difference being that they are modified to permit transportation of the entire van by ship. It can only be concluded that the vans and trailers are, in fact, vehicles, or at least instruments of transportation, and the mere use of a new technology in shipping does not destroy the tax immunity of the property shipped."

Treating the vehicle of transportation as being an "original package" would wipe out completely all immunity of imported goods from local taxation because in every case the imported goods must necessarily be brought into this country in some vehicle of transportation.

Such a result cannot be reconciled with *Brown v. Maryland* and other decisions of this Court hereinabove cited and discussed.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this Court should reverse that portion of the Supreme Court of Georgia's decision which holds the imported tires to be taxable, and should hold that such imported tires are immune from local taxation.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF FOR RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Whether tires imported by Petitioner in bulk in sealed sea vans and over-the-road trailers, but which after arrival at its warehouse have been sorted and segregated as to size and style and stacked on wooden pallets with other tires in its warehouse so that the individual shipments are no longer separate and identifiable units, are nonetheless immune from local ad valorem taxes by reason of Article I, Section 10, Clause 2 of the Constitution of the United States?

STATEMENT OF THE CASE

In addition to recitals made by Petitioner, at the interlocutory hearing in the Superior Court of Gwinnett County, Georgia, the Petitioner placed in evidence an affidavit of Roland A. LaCroix, its Administrative Manager [A.62-66] and oral testimony of Robert E. Stone, Trans Operation Manager of its facility located at Norcross in Gwinnett County [A.28-57].

Mr. Stone was unable to define the relationship existing between the Petitioner and the manufacturer of the tires [A.40-43], and when pressed on cross-examination stated [A.41-42].

> "A. You are getting me involved in a technical aspect of our corporation, our company that I honestly can not give you any information on. I do not have the information, I do not know. I've never looked into this aspect of the corporation of the company. When you bring in the limited aspects of either, simply terminologies that is used in various companies. There is only one Michelin Tire, whatever. It is a privately owned company of its parent office in France, of which all other countries are directly connected, so if you mind."

This witness was no more specific as to who brings the tires into the United States [A.42].

> "Q. So it may be that this Michelin Tire Corp. is a subsidiary? Would this be the way you would normally [Tr. 26] describe it, of the parent company in France? A. I honestly can not answer that because I don't know the legal aspects. You are getting me involved in something I'm just not——"

Thereafter, Intermaritime Forwarding Corporation, of New York City, was identified as performing the necessary documentation [A.42].

The property on which the warehouse is located in Gwinnett County, Georgia, is owned by Michelin [A.50], but whether the Petitioner or some other corporation Mr. Stone was unable to relate [A.51]. Plans are underway for the manufacture of Michelin tires at Greenville, South Carolina [A.48], and a public warehouse located in Clayton County, Georgia, is also being utilized as a storage and distribution facility [A.52].

The sea vans and over the road trailers into which the tires are loaded at the factories are sealed [A.43], the seal is broken at the port of customs and resealed [A.44], and then opened on arrival at Petitioner's warehouse in Gwinnett County, Georgia [A.44]. When the vans are opened the tires are removed and loaded onto wooden pallets by size [A.46].

The tires are loosely stacked on a wooden pallet which is picked up and transported from the vans into the warehouse [A. 47]. The tires are stacked—four stacks of five tires each on each large pallet—and then a heavy cardboard comb is placed down through the center and another pallet of those tires placed on that one, three high [A.47]. The tires are segregated by size and style within the warehouse [A.46, 56] and tires received from France and Nova Scotia would be distinguishable only that one would say made in France and the other made in Canada [A.56]. The tires are separated basically by size and type of tire, but not in identifiable lots as far as where they are manufactured [A.57].

Describing the method of business with franchise dealers, Mr. Stone stated as the dealers' requirements are sent to the warehouse, orders are prepared for shipment and various methods of transportation called in and the tires transported to the dealers [A. 51]. However, a Lawrenceville, Georgia [local Gwinnett County] dealer desiring "X" number of tires of a certain size could obtain them by "common carrier or UPS or he could come in on a customer pick-up basis, and pick them up" [A. 51].

If the local dealer needed four tires he could send his truck to Petitioner's warehouse, and the tires would be pulled out of inventory and loaded on his truck [A. 51]. The purchase of a whole pallet of tires would not be required [A. 51].

Respondents placed in evidence the NOD tax returns for the years 1972 and 1973, and oral testimony of Robert L. Wilson, Administrator of the Tax Assessor's office [A. 58-60]. Mr. Wilson related observations made by him at Petitioner's warehouse, i.e., the tires have always been stacked on wooden pallets, several tires to each pile; that you know from visual observation they are Michelin tires, but could not say they came in on a certain day, in a certain truck or Sea pack, whatever [A. 60].

The Decision of the Supreme Court of Georgia

While the entire decision of the Supreme Court of Georgia is exhibited with the Petition of Certiorari [A-6 through A-19] the crux of the Court's holding is here reproduced for ready reference:

> "As we read *Brown v. Maryland*, supra, it establishes a 'two-hat' approach to importers for resale. Such importers are free to deal with their goods as imports after the goods are in this country; and, if they do so, the goods remain immune from state taxation. When, however, the importer deals with his goods as a seller, he becomes Chief Justice Marshall's 'itinerant peddler'; and the goods become subject to state taxation. The original package doctrine is not a mechanical, universally applicable test; it is, instead, a useful means in many cases of determining which hat the importer-seller is wearing, because frequently the act of breaking the original package is preliminary to converting the imports to salable units.

> In the case at bar the entire Michelin tire inventory was unpackaged, and all shipments in the inventory were commingled and stored by size and type to make the individual units immediately available for resale. We therefore hold that the tires, imported in bulk without packaging, which have been sorted, segregated by size and style, and commingled with other shipments have lost their status as 'imports' and are subject to taxation."
>
> • • • • • • • •
>
> "The great weight of authority makes a vast distinction between goods shipped in packaging, such as crates or cartons, and goods shipped in bulk. Packaged imports retain their status as imports, and are not subject to taxation. Bulk imports that have been mingled with other bulk imports, sorted, and arranged for sale do not retain their status as imports, and they are subject to taxation."

SUMMARY OF ARGUMENT

The right of the State of Georgia and its political subdivisions to levy non-discriminatory ad valorem taxes on real and personal property is a necessary incident of sovereignty established by its Constitution and statutory scheme of taxation.

The "original form or package" doctrine as announced in *Brown v. Maryland* (1827), 25 U.S. [12 Wheat.] 419, 6 L.Ed. 678, does not afford immunity to Petitioner's tires from non-discriminatory ad valorem taxation under the facts here appearing.

The *definition* of "original package" is the same under the Import-Export clause as under the Commerce clause. "Original package" may consist of the container in which goods are transported, without particular regard to the size of the container, or

may consist of "aggregation of goods" in the case of shipments in bulk. In either event the "original package" is that package delivered to the carrier at the initial point of shipment in the exact condition in which it was shipped.

"Original form," as relied on by Petitioner herein, does not constitute an independent basis for immunizing imported goods from taxation. This Honorable Court so held in *F. May & Company v. New Orleans* (1900), 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 1165.

Whether the Sea Vans and over-the-road containers are considered the "original packages", or the "aggregation of goods" contained therein are so considered, the Supreme Court of Georgia correctly held the tires subject to local non-discriminatory ad valorem taxation because entry into such vans, removal of the tires therefrom, stacking same onto wooden pallets, after first sorting and segregating same by size and style, thus co-mingling same with other shipments, terminated the import process.

ARGUMENT

1

The Tax Assailed by Petitioner Is a Non-Discriminatory Ad Valorem Assessment Made Under the Constitution and Laws of the State of Georgia as an Attribute of Sovereignty.

By *Article VII, Section I, Pararaph I* [*Georgia Code Section* 2-5401] of the Georgia Constitution of 1945 it is provided [Addendum I]:

> "The right of taxation is a sovereign right—inalienable, indestructible—is the life of the State, and rightfully belongs to the people in all Republican governments . . ."[1]

Georgia Code Section 92-101 reads:

> "All real and personal property, whether owned by individuals or corporations, resident or nonresident, shall be liable to taxation, except as otherwise provided by law."

Georgia Code Section 92-105 states:

> "Lands or other property belonging to citizens of the United States, not residents of this State, shall not be taxed higher than the property of residents, but such nonresidents, whether their property in this State is real or personal, shall pay taxes on the same herein."

Petitioner makes no contention that Respondents are ignoring the admonition of the foregoing statute, or that the assessment made proposes a higher rate than that levied against the property of residents.

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[1] This principle is well established. *Curry v. McCanless*, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339, 123 ALR 162. See also *84 CJS, Taxation*, § 4, p. 41.

2

The "Original Form or Package" Doctrine Announced in Brown v. Maryland Does Not Extend to the Limits Sought by Petitioner.

In announcing the "original form or package" doctrine in *Brown v. Maryland* (1827), 25 U.S. [12 Wheat.] 419, 6 L.Ed. 678, Mr. Chief Justice Marshall carefully refrained from defining the limits to which same would extend or not extend as the case may be. At the risk of being repetitive, but for easy reference, we quote (P. 441):

> "The constitutional prohibition on the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. *Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application.*" [Emphasis supplied.]

It is obvious the learned Chief Justice with prophetic vision foresaw that with the passage of time activities of importers would become more complex, new means of transportation would evolve, and the simple handling of goods by importers would be supplanted by more sophisticated methods.[2]

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[2] *Cf. Cook v. Marshall County*, 196 U.S. 259, 25 S.Ct. 233, 49 L.Ed. 471 ". . . in the changed and changing conditions of commerce between the states, packages in which shipments may be made from one state to another may be smaller than those 'bales, hogsheads, barrels, or tierces', to which the term was originally applied by Chief Justice Marshall . . ." In short, the flying box car of today may be replaced by a guided missile tomorrow.

(a)

"Original package" is that package delivered by the importer to the carrier at the initial point of shipment.

In the early decision of *McGregor v. Cone* (1898), 104 Iowa 465, 73 N.W. 1041, 1043, the Supreme Court of Iowa, after detailed discussion defined "original package" thus:

> "The original package, then, is that package which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. If sold, it must be in the form as shipped or received, for, if the package be broken after such delivery, it, by that act alone, becomes a part of the common mass of property within the state, and is subject to the laws of that state passed in virtue of its police power."[3]

Under this definition the "original package" is the particular package delivered to the carrier at the initial point of shipment whether enclosed in some way or merely an aggregation of goods.

The "aggregation of goods"[4] definition of "original package" is of early origin and has been accepted by the Courts and text writers alike. *Austin v. State* (1898), 101 Tenn. 563, 575, 48 S.W. 305, 308 [affirmed 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224], announced:

> "Speaking generally, we would say that an original package, as applied to interstate and international commerce, is a package, bundle or *aggregation of goods*, put

---

[3] Cf. 15 *Am Jur 2d Commerce*, § 46, p. 685. *Annotation*: *What is an "original package" within interstate or international commerce.* 26 ALR 971.

[4] Sometimes equated with "commercial unit of importation". *Columbus Steel Supply Co. v. Kosydar* (1974), 38 Ohio St. 2d 258, 313 N.E. 2d 389, 393, infra.

up, in whatever form, covering, or receptacle, for transportation, and as a unit transported from one state or nation to another." [Emphasis supplied.][5]

3

"Original Form" as Urged by Petitioner, Is Not an Independent Basis for Immunity of Imported Goods From Non-Discriminatory Ad Valorem Taxation.

Almost seventy five years subsequent to the decision in *Brown v. Maryland* this Honorable Court rendered its decision in *F. May & Company v. New Orleans* (1900), 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 1165. The Court there expressed views [but again without defining ultimate limits] which are contrary to the contentions here made by Petitioner and deny immunity from non-discriminatory local ad valorem taxes to the imported tires in its warehouse in Gwinnett County, Georgia. Again we quote (p. 502):

> "Two views of the general question are presented for our consideration.
>
> One is that the box, case, or bale in which the plaintiffs' goods were brought from Europe was not the original package; that each separate parcel or bundle placed in such box, case, or bale was itself an original packge; nd that within the meaning of the Constitution no one of such separate parcels or bundles lost its distinctive character as an import and became part of the mass of property in the state, liable to local taxation, until after that separate parcel or bundle had been sold by the importers. This is substantially the proposition pressed upon our attention by the plaintiffs.
>
> The other view is that the box, case, or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer, or packer was to be regarded as the original package, and that upon the opening of such box, bale, or case for the purpose of using or exposing to sale such separate parcels or bundles, each parcel or bundle lost its distinctive character as an import and became a part of the general mass of property in the state subject to local taxation. This is the proposition advanced on behalf of the defendant."

Having thereby placed the controversy between the parties in clear perspective the Court discussed the importer's contention thus [pp. 502-503]:

> "In other words, they argue that the importer may sell each separate package either from the box in which it was transported, after it is opened, or from the shelves or counters in his store, without being subjected to local taxation in respect of any package so brought into the country, provided such separate package be sold or offered for sale *in the form* in which it was when placed in the box, case, or bale by the European manufacturer or packer. This means that the power of the state to tax goods, the product of other countries, depends upon *the particular form* in which the European manufacturer or packer, of his own accord or by direction of the importer, has put them up in order to be sent to this country. The necessary result of this position is that every merchant selling only goods of foreign manufacture, in separate packages, although enjoying the protection of the local government acting under its police powers, may conduct his business, however large, without any liability what-

[5] The same definition of "original package" applies to international trade and interstate commerce. *Baldwin v. G.A.F. Seelig, Inc.* (1935), 294 U.S. 511, 526, 55 S.Ct. 497, 79 L.Ed. 1032; *Anglo-Chilean Nitrate Sales Corp. v. Alabama* (1933), 288 U.S. 218, 226, footnote 2; 53 S.Ct. 373, 77 L.Ed. 710.

ever to state or local taxation in respect of such goods, provided he takes care to have the articles imported separtely wrapped and placed *in that form* in a box, case, or bale for transportation to and sale in this country. In this view, if a jeweler desires to buy fifty Geneva watches for the purpose of selling them here without paying taxes upon them *as property*, [sic] he need only direct them to be placed in separate cases, however small, and then put them all together in one box. After paying the import duties on all the watches in the box, and receiving the box at his store, he may open the box, and the watches, each one being in its own separate case, may then be exposed for sale. According to the contention of the plaintiffs, each watch, in its own separate case, would be an original package, and could not be regarded as part of the mass of property of the state and subject to local taxation, so long as it remained *in that form* and unsold in the hands of the importer." [Emphasis supplied.]

Respondents readily concede the Court was not there dealing with unboxed or unwrapped articles of merchandise. Nonetheless, "each separate tire" could easily be substituted for "each separate package" in the foregoing quotation with no violence to the holding.[6] To insist that unwrapped or uncovered tires shipped in bulk are to be treated differently from the boxed watch utilized in the Court's illustration is attempting distinction without real difference. "Original form," as relied on by Petitioner herein, is not in the light of the fore-

[6] In *Hooven & Allison Co. v. Evatt* (1945), 324 U.S. 652, 663, 65 S.Ct. 870, 89 L.Ed. 1264, it was stated: "When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities or on the technical procedures by which it is effected."

going holding to be lifted from its context and utilized as an independent basis for immunizing imported goods from local taxation.[7]

4

The Supreme Court of Georgia Correctly Held That the Opening of the Vans, Removal of the Tires Therefrom, Placing Same on Wooden Pallets After Sorting, Segregating and Stacking Same by Size and Style Terminated the Import Process.

As noted by Petitioner in its brief (p. 18), the Supreme Court of Georgia rejected the view that sea vans and over-the-road containers are "original packages". Nonetheless, the Court correctly held that the activities of Petitioner with reference to the tires after their arrival at its warehouse in Gwinnett County, Georgia, terminated the import process.

Whether the sea vans and over-the-road containers be considered the "original package", or the "aggregation of goods" comprising bulk shipments enclosed therein is so considered, leads invariably to the same result. The "flow of distribution" argued for by Petitioner is interrupted by entry into the vans or breaking of the aggregate, or both, and at such point the goods lose their characteristic as imports.

The view that sea vans and over-the-road containers utilized for shipments in bulk constitute "original packages" finds substantial support not only in decisions by this Honorable Court but also holdings of State courts of last resort. The size of such containers, upon which much stress is laid by Petitioner in its brief (p. 18), is not necessarily controlling. This lies within the

[7] The "original form" of some articles of commerce never changes. Being circumferential in form and shape, Petitioner's tires will retain this characteristic throughout their entire useful life.

discretion of the shipper and becomes material only if an intent to evade applicable laws exists.[8]

E. J. Stanton & Sons v. Los Angeles County (1947), 78 Cal. App. 2d 181, 177 P.2d 804, cer. den. 332 U.S. 766, 68 S.Ct. 75, 92 L.Ed. 352, contrary to assertions of Petitioner, is a well reasoned opinion dealing with "aggregation of goods" as an original package. The California court pointed out (p. 807):

> "Indeed such articles of commerce as steel beams, threshing machines, telegraph poles and many others might be cited as illustrative of classes of imports that are incapable of being wrapped in cellophane or encased in wooden or steel crates. Although they might arrive at the dock without cover, nevertheless a shipment of such articles constitutes the original form or package."

By the same token articles of commerce *capable* of being wrapped or encased [such as automobile and truck tires], but which at the option of the importer are shipped in bulk not so wrapped or so encased, are no less an "aggregation of goods".

The statement in *Stanton* (p. 808), so strongly assailed by Petitioner [Brief, p. 15], is obviously used by way of illustration:[9]

---

[8] *Texas Company v. Brown* (1922), 258 U.S. 466, 42 S.Ct. 375, 66 L.Ed. 721; *Cook v. Marshall County* (1905), 196 U.S. 261, 25 S.Ct. 233, 43 L.Ed. 471; *State v. Armour & Company* (1914), 27 N.D. 177, 145 N.W. 1033, (affirmed 240 U.S. 510, 36 S.Ct. 440, 60 L.Ed. 771); *Mexican Petroleum Corporation v. City of South Portland*, 121 Me. 128, 115 A. 900, 26 ALR 965); *Sugarman v. State Board of Equalization* (1958), 51 Cal. 2d 361, 333 P2d 333.

[9] The "original form or package" test has itself upon occasion been characterized as "not an ultimate principle . . .[but] an illustration of a principle". Mr. Justice Cardozo, *Baldwin v. G.A.F. Seelig, Inc.* (1935), 294 U.S. 511, 527; 55 S.Ct. 497, 79 L.Ed. 1032, supra.

> "A cargo of planks, timbers or logs imported from foreign lands is surrounded by the *invisible gossamer*[10] woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds its invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then a reasonable construction of section 10 and the decisions which have interpreted its meaning compel the termination of immunity from local taxation of such broken lots and commingled remnants of imported lumber." [Emphasis supplied.]

Reverting again to *F. May & Co. v. New Orleans* (1900), 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 1165, other language appearing therein clearly indicates the same result would have been reached had the individual items referred to been removed from an "aggregation of goods." We quote (p.508):

> "We have seen that the plaintiffs, in effect, contend that having paid the duties imposed by the United States they were entitled, without liability to taxation upon the goods as property, to open the boxes in which the separate parcels of goods were transported, and put such separate parcels in the hands of agents to be sold wherever, in the state or in the country, customers could be found. The

---

[10] An expression employed with some frequency by Mr. Justice Frankfurter: "gossamer distinctions" *Helvering v. Hallock* (1940), 309 U.S. 106, 118, 60 S.Ct. 444, 84 L.Ed. 604; "gossamer threads" *Polish National Alliance of the United States v. National Labor Relations Board* (1944), 322 U.S. 643, 651; 64 S.Ct. 1196, 88 L.Ed. 1509; "gossamer lines" *Burton-Sutton Oil Company v. Commissioner of Internal Revenue* (1946), 328 U.S. 25, 38; 66 S.Ct. 861, 90 L.Ed. 1062, 1070.

> separate parcels—such is the effect of the argument—are not to be deemed incorporated into the mass of the property of the state while thus being carried around the country by the importer's agents—no separate parcel, so long as it remained *in the particular form* in which it was packed in a box or case with other parcels, ceasing to have the character of an import until after it was sold by such agents. This proposition cannot be sustained. We cannot doubt that the goods when placed in the hands of agents for sale, *in separate parcels*, have been so acted upon by the importer that they have ceased to be imports, and have become part of the mass of the property of the state, liable to local taxation."

Individual tires, drawn from an "aggregation of goods", and sold to franchised dealers clearly equates with "separate parcels", and the franchised dealers with "agents" for purposes of the foregoing quotation. The holdings in *Volkswagen Pacific, Inc. v. City of Los Angeles* (1972), 7 Cal. 3d 48, 101 Cal. Rptr. 869, 496 P.2d 1237, and *Columbus Steel Supply Co. v. Kosydar* (1974), 38 Ohio St.2d 258, 313 N.E.2d 389, accord with the foregoing.

From *Columbus Steel Supply Co.*, supra, it appears steel pipe was the item of import and (p.393)

> "Appellant acted upon the pipe in this way: As the pipe was unloaded, appellant severed bands around some of the pipe in the commercial unit; the unit was then distributed in a sorting process where like pipes were gathered together; the pipe was placed in segregated stacks, presumably with like pipe which had arrived in previous imported shipments; the pipe then became inventory stock exhibited for sale; and pipe was removed piecemeal from the stacks for sale to buyers."

The Ohio Court concluded that "each item of pipe which arrived in a shipment was an integral part of the aggregate which

composed the commercial unit, and that when an item of pipe was separated from the commercial unit, or was sorted or segregated from other items comprising the commercial unit, the original package was broken or 'opened.' "

The decisions of this Honorable Court stressed by Petitioner do not in any respect depart from the philosophy expressed in *F. May & Co. v. New Orleans*, supra. *Hooven & Allison Co. v. Evatt* (1945), 324 U. S. 652, 65 S.Ct. 870, 89 L.Ed. 1264, described the immunity afforded imported goods by the Import Clause of the Constitution thus:

> ". . . that immunity survives their arrival in this country and continues until they are [1] sold, [2] removed from the original package, or [3] put to the use for which they are imported. (cits.)" [Brackets supplied].

The goods being here considered were bales of hemp and other fibers—not an aggregation of goods shipped in bulk—and a "use" as opposed to a "sale" situation existed.[11]

The same is true of *Youngstown Sheet and Tube Company v. Bowers*, and *U.S. Plywood Corporation v. City of Algoma*, decided together (1959), 358 U.S. 534, 79 S.Ct. 383, 3 L.Ed. 2d 490, the materials there involved having been placed in the inventory of raw materials for use in the manufacturing business of the importers.

That *Department of Revenue v. James B. Beam Distilling Co.* (1963), 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed. 2d 362, does not support Petitioner's position here appears from the opinion of the Court

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[11] *Hooven* was reviewed in extenso by Prof. Thomas Reed Powell: *State Taxation of Imports—When Does an Import Cease to Be an Import?* 58 Harvard Law Review 858. Of *Brown v. Maryland*, supra, Prof. Powell significantly states (p. 863): "Certainly Marshall's general expressions warrant confidence that his view was that the immunity lasted until sale *or* use *or* breaking bulk."

"It is not disputed that . . . 'the tax was collected while the whisky remained in unbroken packages . . .' "

Bulk shipment was obviously in no sense involved.

The *Youngstown Sheet and Tube* and *U.S. Plywood Cases* were reviewed in 73 *Harvard Law Review* 176. Once again we beg leave to quote therefrom (p. 178):

> "The decision seems to move the curtain of constitutional protection back one step in the case of the manufacturer-importer, although it does not question directly the line drawn in the case of the seller-importer. On the other hand, in view of the illogic of a dichotomy between manufacturer and seller, it is possible that the present decision portends a change in the import-for-sale area. As an original question today, it is arguable that there should be no bar to the application of a general property tax to any imported goods that are no longer in transit. The prohibition of the import-export clause seems to be directed at discriminatory taxes favoring domestic products, and at taxes which the imports first pass at the expense of the interior states of final destination and use. A general property tax, being nondiscriminatory, would not tend to exclude foreign goods. Furthermore, in view of the development of air freight and the expansion of inland waterways, the distinction between importing and shipping interstate is no longer as clear. In addition, the states in which the imports are stored, whether the goods are destined for resale or for use in manufacturing, do provide protection for the goods, and this protection is one of the conventional theoretical bases for sustaining property taxation."

Stronger argument in behalf of Respondents here could hardly be made.

Florida Greenheart Corporation v. Gautier (1965), 172 So. 2d 589, cer. den. 382 U.S. 825, 15 L.Ed.2d 70, is a slender

reed upon which to urge reversal of the Supreme Court of Georgia in instant case. The decision was by a divided court the cleavage in thought resulting from differing views of the facts presented. The majority equated the facts with an earlier decision by the Florida Court involving canned meats imported from Europe and stored in the original unbroken cases: *Overstreet v. Frederick B. Cooper Co.* (1961), 134 So.2d 225.[12] The dissenting judges viewed the situation in different perspective and the dissent is the better reasoned view.

Had the decision in *Standard-Triumph Motor Company, Inc. v. City of Houston* (S.D.Tex. 1963), 220 F. Supp. 732, not been vacated on jurisdictional grounds [5 Cir., 347 F.2d 194, cer. den. 382 U.S. 974], it would have been difficult to sustain on review since the statement of facts indicates that after arrival at the port of entry battery cables were attached, gasoline placed in the tanks, and water poured in the radiators of the vehicles. In short, whereas the vehicles could neither be cranked nor operated before the servicing they could be cranked and operated thereafter. The vehicles, therefore, were no longer in their "original form".

Citreon Cars Corporation v. City of New York (1972), 30 N.Y.2d 300, 283 N.E.2d 758, bears factual resemblance to *Standard-Triumph Motor Company* and cites same in support of the result reached. Imported vehicles were involved, with batteries, wipers and rear view mirrors installed at the port of entry upon unloading, together with sealed beam lights of American manufacture. However, a portion of the goods was determined subject to taxation and the following statement by the New York court is most significant (p. 761):

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[12] The *Overstreet Case* obviously involved facts parallel to the bottles of champagne in unbroken cases appearing in *Low v. Austin* (1871), 80 U.S. (13 Wall.) 29, 20 L.Ed. 517, and therefore of easy solution. Analogy to bulk shipment of lumber without packaging would be faulty as the dissenting judges emphasized.

"As with the original package doctrine a line must be drawn, sometimes arbitrarily, beyond which the immunity will not extend. (cit.)"

CONCLUSION

The importance of this case to the citizens of Gwinnett County, Georgia, is self-evident. Other importers are already located therein [A.25], and if shipments of goods in bulk designed for what is essentially a wholesale rather than an import operation are to be exempted from ad valorem taxation such wholesalers will have a tremendous advantage over their resident competitors. At the same time such wholesalers will be receiving protection for such goods at the expense of the other taxpayers of the County. To this end affirmance of the decision of the Supreme Court of Georgia is respectfully urged.

Respectfully submitted

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ADDENDUM

ADDENDUM I

Constitution of Georgia of 1945

Article VII, Section I, Paragraph I

2-5401 (6462, 6557) Paragraph I. Taxation, a sovereign right; tax on corporations

The right of taxation is a sovereign right—inalienable, indestructible—is the life of the State, and rightfully belongs to the people in all Republican governments, and neither the General Assembly, nor any, nor all other departments of the Government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts, and all other acts, whatsoever, by said government, or any department thereof, to affect any of these purposes, shall be, and are hereby, declared to be null and void, for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant or contract, whatsoever, by the General Assembly.

The power to tax corporations and corporate property, shall not be surrendered or suspended by any contract, or grant to which the State shall be a party.

The General Assembly is hereby authorized to provide by law for the granting of funds to a county in which is located land belonging to the State consisting of at least 20,000 acres from which such county receives no taxes. The General Assembly is authorized to provide in such law the procedure for determining the amount of funds and all other matters relative to any such grant.

Supreme Court, U. S.
FILED
SEP 2 1975
MICHAEL RODAK, JR., CLERK

No. 74-1396

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

MICHELIN TIRE CORPORATION,

Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

AMICI CURIAE BRIEF

For: County of Los Angeles; The Cities of Houston, Texas and Long Beach and Glendale, California; The California Counties of Alameda, Butte, Fresno, Humboldt, Kern, Marin, Monterey, Orange, Riverside, Sacramento, Sonoma, Tulare, Tuolumne, and Yolo; E. C. Williams, San Diego County Assessor; Philip E. Watson, Los Angeles County Assessor; and the City and County of San Francisco, California

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No. 74-1396

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1974

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,
Respondents.

AMICI CURIAE BRIEF

SUMMARY OF ARGUMENT

The states and their local governments are presently confronted with the fact that their residents and domestic manufacturers are discriminated against in favor of importer distributors. The Petitioner's proposals to this Court magnify that discrimination, in that no property tax may be assessed in the state which the importer chooses for a distribution center, until the goods are sold.

Article I §10 Clause 2 prohibits imports and duties, but not other forms of taxes. A study of commerce and taxation in effect in 1827 reveals that *Brown v. Maryland* (1827)

25 U.S. (12 Wheat)419, 6 L.Ed. 678 prohibited only discriminatory taxes and that the original package "doctrine" was applied only to goods awaiting immediate transportation inland. The later extrapolation of the original package idea was the result of a failure to review the historical setting of the opinion in that case and the policies behind the Constitutional provisions. Those policies do not support the discrimination practiced against distributing states' residents and producers.

Applying principles of Constitutional interpretation to prohibiting the states from taxing any of the goods in this case, indicates that the discrimination creates an inconsistency between Article I § 10 Clause 2 and the Fifth Amendment. Prohibiting such taxes is contrary to the Tenth Amendment. Interpretation of Article I §9 Clause 5, of Article I § 10 Clause 3, and of different provisions of Article I §10 Clause 2, are wholly inconsistent with interpreting the Import-Export Clause so as to prohibit the taxation of any of the goods.

Youngstown Sheet & Tube Co. v. Bowers (1959) 358 U.S. 534, 3 L.Ed.2d 490, 79 S.Ct. 383, if applied to this case, would serve the purposes of the Import-Export Clause and would partially reduce the discrimination. There is no distinction between the facts of that case and the facts of this one (as related to both packaged and unpackaged goods) which in any way affects the policies of the Constitution.

The Petitioner's "original form doctrine" magnifies the discrimination and is not supported by *Brown v. Maryland, supra.* In fact, the Petitioner advocates the rule that bulk goods must be sold or used before they may be taxed. The "original package" was meant to be the shipping package. If there is an "original form doctrine," it should be the "shipping form." Sea vans, or cargo containers, as means of sending the goods from the foreign manufacturer to the point where the goods are to be readied for sale, have an evidentiary role to play.

The process of importation has ended and that of domestic commerce has begun. Even under the most restrictive interpretation of the states' ability to act, a nondiscriminatory tax should be levied at this point.

INTRODUCTION

This case involves a claim for tax refund brought by an importer/distributor. Its goods, both packaged and unpackaged, arrive at the inland town which serves as its distribution center for the six southeastern states. From that point, the goods are sold to the importing company's franchisees in those states. Although the Petitioner has directed the Court's attention only to the question of the tires arriving

in bulk, it is clear that raising any question regarding Article I. § 10, Clause 2, of the United States Constitution involves several problems. Many of these have been discussed by various Courts. With the exception of the decision in *Youngstown Sheet & Tube Company v. Bowers* (1959) 358 U.S. 534, 3 L.Ed.2d 490, 79 S.Ct. 383, very little attention has been paid to the policies behind the Import-Export Clause, the meaning of the words used therein, and the context and language of the case which first interpreted its effect on imports. *Brown v. Maryland* (1827) 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678.

POINT I

THE PROBLEM

POINT Ia

FOR THE STATES AND LOCALITIES CHOSEN BY IMPORTERS/DISTRIBUTORS AS THEIR DISTRIBUTION POINT

Local governments are facing a crucial dilemma in 1975. They rely largely on ad valorem property taxes to pay their costs (Early & Weitzman, *A Century of Dissent: The Immunity of Goods Imported for Resale from Nondiscriminatory State Personal Property Taxes* 7 Southwestern Law

Review 247, Summer 1975, at page 270). The people of Lawrenceville, Georgia and of Gwinnett County, for instance, must pay for the services which the county renders, including police, courts, jails, road building and maintenance, and fire protection. This is as it should be. But in addition, they must pay for this protection for the importers who may have chosen Lawrenceville as a distribution center because those importers, under the ruling of the Supreme Court of Georgia, do not have to pay any taxes on goods which are contained in cardboard boxes. Petitioner here asserts that it is also not liable for taxes on its tires. The local residents must pay for these services, even though the police and fire departments protect the goods and the roads help speed them on their way once they are sold. None of these costs are paid for by the customs duties which importers may have to pay to the Federal Government. In fact, in many cases, no duty is required at all (19 USCA § 1202).

The residents are not the only people who pay to protect imported goods. The domestic and out-of-state manufacturers, who transport their goods to Lawrenceville either for sale or for distribution, even out-of-state, must pay taxes on their goods (cf. *Minnesota v. Blasius* [1933] 290 U.S. 1, 78 L.Ed. 131, 54 S.Ct. 34). This inequality has two effects: first, the domestic producer must pay part of the importer's cost of protecting his goods; second, the domestic producer's costs rise whereas the importer/distributor's do not.

At the same time, the local residents receive precious few of the benefits which come as a result of this largesse. To be sure, some of the residents of this locality may be able to buy these imported tires at lower prices than if all of the people of the taxing jurisdiction had not supported the importer/distributor's operation. Considering the amount of money paid by the individual who does pay his fair share of the tax burden, this saving is minimal.

There are, in actuality, two classes of people who may benefit greatly from this windfall: The first, of course, is the importer himself who is able to sell more of his goods than the domestic manufacturer of the same goods because his prices may be lower, since he does not have to pay the same property taxes as the domestic manufacturer must. The second person who benefits is the buyer of the tires who does *not* live in the taxing jurisdiction. He is able to buy his products at a reduced price, without having to pay taxes to support the importer/distributor.

It may well be that even this unequal benefit to the out-of-state buyer is illusory. The importer may just as easily maintain his prices to the retail buyer and retain the benefits of lower costs. Of course, passing the savings on or retaining profits is usually a decision based upon the importer/distributor's share of the market, his stockholders, income taxes, and other like considerations.

It is clear that this Court's decision in this case, whatever the result, will effect this dilemma. It will either resolve it or increase it, and it will also effect a substantial amount of money. Los Angeles County alone will loose $15,000,000.00 per year if the efficacy of *Volkswagen Pacific, Inc. v. City of Los Angeles* (1972) 7 Cal.2d 48, 101 Cal.Rptr. 869, 496 P.2d 1237, is cast in doubt, and an unascertained amount if *E.J. Stanton & Sons v. County of Los Angeles* (1947) 78 Cal.App.2d 181, 177 P.2d 804, cert. den. 323 U.S. 766, 92 L.Ed. 352, 68 S.Ct. 75, is overruled. The Court's decision will also effect the 120 cases now pending on this issue before the Superior Court of Los Angeles County, as well as the four cases presently before the Courts of Appeal on this issue. In addition revenue will be affected in the other Amici's territories, both inland localities and large consumer areas.

POINT Ib

IMPORTER'S REPLY

It is almost automatic for the importer/distributor to point to what has been termed the "original package doctrine" in reply to the dilemma of the local governments. The Petitioner herein refers to an "original form doctrine." The idea behind both, however, is the same. It rests upon one-half sentence in *Brown v. Maryland, supra,* which states:

> ". . . but while remaining the property of the importer, in his warehouse, in which it was imported, a tax upon it is too plainly a duty upon imports to escape the prohibition in the Constitution." (25 U.S. at page 441, 6 L.Ed. at page 686.)

Cases since the end of the Nineteenth Century have construed this sentence to mean that any imported goods which are sealed in a box, which are held in *any* warehouse belonging to an importer, are considered to be free from *all* taxes. (See *Low v. Austin* (1871) 80 U.S. (13 Wall.) 29, 20 L.Ed. 517, and *Hooven & Ellison v. Evatt* (1946) 324 U.S. 652, 89 L.Ed. 1251, 65 S.Ct. 870).

This has not always been so true in the case of goods which arrive in bulk (cf. *Mexican Petroleum Corp. v. South Portland* [1922] 121 Me. 128, 115 A. 900; *City of Galveston v. Mexican Petroleum Corporation* [D.C. Texas 1926] 15 Fed.2d 208; *Volkswagen Pacific, Inc. v. City of Los Angeles, supra,* as well as cases cited by Petitioner). Nevertheless, the warehouse of the importer has achieved a certain status as a sanctuary wherein the local authorities may not tread.

It is clear, however, that it is the warehouse of the importer of foreign goods which is clothed with this characteristic. The Courts have treated warehouses and distributorships

belonging to domestic producers and "importers" from other states quite differently, allowing the taxing authorities to tax those goods in a nondiscriminatory fashion when they come to rest in the state and are at the disposal of the owner for his own purposes (Cf. *Woodruff v. Parham* [1869] 75 U.S. [8 Wall.] 123, 19 L.Ed. 382, and *Minnesota v. Blasius* [1933] 290 U.S. 1, 78 L.Ed. 131, 54 S.Ct. 34). It is clear that the warehouse of the exporter has no such sanctity. Usually, if commitment to an actual mode of transit has not been made, the goods of the exporter are taxable (cf. *Carson Petroleum Co. v. Vial* (1928) 279 U.S. 95, 73 L.Ed. 626, 49 S.Ct. 292, and U.S. Constitution Art. I §9 Cl. 5).

Even before imported goods arrive at the warehouse, they are subject to nondiscriminatory tonnage duties which have a basis in services (cf. Art. I §10 Cl. 3; *Clyde Mallory Lines v. Ala.* [1935] 296 U.S. 261, 80 L.Ed. 215, 56 S.Ct. 194).

Many Courts have gone no further than that one-half sentence in *Brown v. Maryland, supra.* But it is apparent that in the face of the dilemma which is confronting the local taxing authorities, there must be some explanation beyond this.

The Petitioner has attempted to do so. It justifies applying the Import-Export prohibition on the following grounds:

1. The importer has a right to sell his goods without being taxed, because he has paid customs

duties (Brief for the Petitioner [hereafter B.P.], pp. 9 and 11);

2. The goods, despite the right bought by paying duties, are taxable, but only at their "final destination" (B.P., p. 10);

3. A nondiscriminatory tax will discriminate against consumers in inland states (B.P., p. 10);

4. Paying local taxes for services and the federally imposed duties puts the importer at a disadvantage vis-a-vis domestic manufacturers; i.e., the duty was meant to replace local taxtaion (B.P., p. 12).

The Petitioner has set forth other arguments supporting its position. But they are not relevant to the policies to be achieved by the Import-Export Clause, and will be discussed later. Petitioner has actually introduced the two basic policies behind the Import-Export Clause:

1. The Import-Export Clause was meant to prevent the importing states from laying a tax on the nonimporting states, which would discriminate against them (Petitioner's reasons 2 and 3, supra);

2. The Federal Government has sole charge of foreign and interstate commerce, and the states should not interfere with that (Petitioner's reasons 1 and 4, supra).

POINT 2

THE POLICIES BEHIND THE IMPORT-EXPORT CLAUSE

The first policy of the Import-Export prohibition was noted by the Court in *Youngstown Sheet & Tube Co. v. Bowers, supra.*

> "The design of the constitutional immunity was to prevent '[t]he great importing states [from laying] a tax on the nonimporting states,'. . . which would not only discriminate against them but also 'would necessarily produce countervailing measures on the part of those states whose situation was less favorable. . .'"
> (358 U.S. at p. 545; 3 L.Ed.2d at p. 498; 79 S.Ct. at p. 389.)

The Petitioner has argued that this discrimination is any increase in price to an inland consumer. The following characterization of the reason for the inclusion in the Federal Constitution of the Import-Export prohibition makes the Petitioner's contentions clear:

> "One of the important reasons for the inclusion in the Federal Constitution of the Import-Export Clause was the desire to prevent the seaboard states from levying taxes on goods flowing through to

inland states." (2 Farrand, Records of the Federal Convention [1911], 441, 442. [B.P. p. 10].)

It is clear, however, that this is not what was meant. First, the purpose of the Import-Export Clause was not to prevent any tax, but only imposts and duties, i.e., those actually discriminating against imports (see discussion, infra; Prof. Henry M. Hart, Jr. *The Supreme Court, 1958 Term*, 73 Harvard Law Review 84 at page 178; and Prof. Thomas Reed Powell *State Taxation of Imports -- When Does an Import Cease To Be an Import*, 58 Harvard Law Review 858; Early & Weitzman, *supra*. Second, interpretations of Article I §10 prohibitions have allowed some state taxation of goods which may be bound to "inland" states (cf. *Burke v. Wells* [1908] 208 U.S. 14, 52 L.Ed. 370, 28 S.Ct. 193; *Clyde Mallory Lines v. Alabama, supra;* and *Youngstown Sheet & Tube Co. v. Bowers, supra).* These taxes may not be similar to the tax in question in other ways (they may technically be imposed before or after the opening of any of the goods' packages or the sale of the goods). But in their burden upon the inland consumer they are the same. Third, it is apparent that the itinerant peddler and the auctioneer, whose goods are taxable under *Brown v. Maryland, supra,* could easily sell in another state or to a consumer from another state after being taxed in their own state. Taxes imposed pursuant to *Brown v. Maryland,* therefore, may result in higher prices on out-of-state goods.

It is clear from the above that the purpose of the Import-Export Clause was not to prohibit *any* price increase which would result from coastal state taxation. In fact, it makes sound economic sense that the consumer should pay the costs of getting the goods to him. To oblige the consumer to pay for police protection of the goods he buys is no less sensible than obliging him to pay for the services of the truck driver or the night watchman who bring the goods safely to him. The only difference is that a government collects part of the cost. This difference did not effect the outcome of an analogous case involving tonnage duties, specifically prohibited by Article I § 10, Clause 3 (*Clyde Mallory Lines v. Alabama, supra*).

What, then, is the purpose of the immunity regarding discrimination against inland states? Clearly, as set forth in *Youngstown Sheet & Tube Co. v. Bowers, supra*, the purpose is to avoid discrimination. Discrimination does not mean that the coastal state may not treat the goods at all, but means that it must treat them all equally. "To make distinctions in treatment" is the definition given by Webster's *New World Dictionary of the American Language* (World Publishing Co., 1958). An impost, or duty (which are specific kinds of taxes directed at imports and exports) does not treat imported goods the same as goods already in the state. The likelihood of those imports being sent off to other states was high (cf. *Madison*, Debates, 192, 196), and the burden on the inland states was clear. The Import-Export Clause, then, was designed to end this tribute.

The way chosen to end this particular form of discrimination against inland states was to end the capability of the coastal state to discriminate against imports and exports. The Constitution gives this job to the Federal Government. It was the central government which was to regulate commerce among the states and with foreign nations (see *Brown v. Maryland, supra,* 25 U.S. at p. 446, 6 L.Ed. at p. 668). Surely, the central government has the right to prevent discrimination against imported goods and any impost or duty would cause that discrimination, unlike other taxes.

The particular type of discrimination against the states ended by Article I §10, Cl. 2 was discrimination against imports (cf. Crossky, *Politics and the Constitution in the History of the United States* [1953], Chicago University Press, pp. 295-323; Madison, Debates, supra,at pp. 192, 196; Powell, supra; Early & Weitzman, supra). Prohibiting imposts and duties, and only imposts and duties, accomplished this.

Second: Related to discrimination against imports is the so-called "importer's right to sell." Two of the Petitioner's claims are based, at least in part, on this concept. 1.) Because the importer paid customs' duties, he has a right to sell the goods without being taxed; 2.) Paying customs' duties and local taxes puts the importer at a disadvantage.

The first claim, of course, is not based on any case. Paying customs duties is not for the purpose of equalizing the effect of local taxation (Preamble to the Tariff Act of 1930,

19 USC § 1202 et seq). A review of this section makes it clear that *the variation of duties paid is not related to local taxation but to the nature of the goods and the country from which the goods come.*

Justice Marshall did not state in *Brown v. Maryland* that customs duties were somehow payment in lieu of local taxes. If this were the case, there would be *no* local taxation of imported goods at any point. There *is* local taxation, however, when original packages are broken and when the goods are treated by their owners for their use (including sale) like any other goods in the country (see discussion of the historical context of *Brown v. Maryland, infra).*

The second claim is, in reality, based upon the first. It makes the assumption that tariffs are meant to protect the importer from local taxation, when, in fact, they are meant, among other things, to protect domestic industry. The importer pays duties in order to be on an equal footing in this country with domestic producers, not better.

What, then, is the right to sell? It does not last, even by the terms of its broadest interpreters beyond the point where shipping containers are opened. Its basis, of course, is in Congress' right to regulate foreign commerce. At a time when the principal source of Federal revenue was customs duties, it is feared that discriminatory taxes might discourage imports. But it is clear that certain sorts of tonnage duties were allowable (*Clyde Mallory Lines v. Alabama, supra.).* At the

same time income taxes on the sale of imported goods were allowed *(Burke v. Wells, supra)* These taxes as well as the license taxes allowed by *Brown v. Maryland* would all inhibit imports. Yet they were all allowed.

At the same time a tax specifically allowed under *Brown v. Maryland, supra,* was struck down by this Court *(Cook v. Pennsylvania* [1878] 97 U.S. 566, 24 L.Ed. 1015). The only difference between those two taxes was their discriminatory nature. Once this is grasped, it is an elementary thing to see that the Federal revenues would have been hampered far more by discriminatory taxation than by non-discriminatory varieties. The intention of the Framers as interpreted by later courts is also apparent. That intention was not to prevent all taxation of imported goods. The only intent was to prevent that taxation which would discriminate against imports. Any other interpretation of this policy is contrary to the actual words of the Constitution, the intent of the Framers, later courts, and, as we shall see, *Brown v. Maryland.*

Cases which simply assert the right of the importer not to be taxed up to a certain point do not relate that right to the policies behind the Import-Export Clause and are unhelpful.

Perhaps it is the Commerce Clause which is founded on a policy which prohibits taxing goods which have come to rest in a state after importation and which are available to the owner for his own uses, including distribution. *Woodruff v.*

Parham, supra, makes it abundantly clear that a state will not interfere with this regulation by imposing property taxes on interstate imports once they are at rest and are at the disposal of the owner, even to ship the goods out of the stateagain (cf. *Minnesota v. Blasius, supra).* It would appear that Congress' regulation of commerce, if seen as uniform, would not call for an absolute right to sell, but only a right to sell on the same footing as domestic producers. Such a uniform rule would allow taxation when the goods have come to rest, for purposes other than merely awaiting transportation (see discussion regarding the role of the warehouse in 1827, infra).

Possibly, however, the power to regulate foreign commerce is different. Possibly, Congress should have more discretion in the area of imports and exports than in the area of domestic commerce. This does not appear to be the case in the area of exports. In that area, the most restrictive test on the taxing authority involves goods produced in one state from which they have commenced their export journey toward another state's deep-water harbor for shipment abroad. *Carson Petroleum Co. v. Vial* (1928) 279 U.S. 95, 73 L.Ed. 626, 49 S.Ct. 292, exemplifies the approach used. It is one which involves the determination of whether commitment to the transportation abroad has been made. Some tests allow the taxing authorities more leeway (cf. *Farmer's Rice Cooperative v. County of Yolo* [1975] 14 Cal.3d 616, 122 Cal.Rptr. 65, 536 P.2d 465). All of the tests, however, revolve around the

degree of commitment to transit and correspond generally to the rules for interstate commerce.

What is there, then, about imports and property taxes which has caused such inequality? The policies of the Clause lead to the conclusion of taxability. There are several arguments often used to prohibit taxation: 1.) The Import-Export prohibition "attaches" to the import in its status as an import; 2.) the importer has a right to sell in unbroken packages; and 3.) the goods may only be taxed at their "ultimate" point of use. These arguments, however, are circular. 1.) The status as an import is cut off at some time. That time should be related to the policies of the Import-Export Clause. 2.) As we have seen the right of the importer is both inconsistent and cut off at some time. Those times should be related to the policies of the Import-Export Clause. 3.) The ultimate point of use is not a creation of the Framers or even *Brown v. Maryland,* but is a concept of later vintage. It is unrelated to the policies because it serves no consistent purpose. A tax at that point is just as hindering as a tax at the distribution point. In fact, *Youngstown Sheet & Tube Co. v. Bowers supra,* holds goods taxable even before they reach an inland consumer. There is no difference in the effect on the importation of the goods whether a tax is imposed before or after the manufacturing process. In addition the process of actually melting the goods down bears little relationship to the determination of taxability.

The question still is, what is there about imports and property taxes which has caused this inequality. Why are imports treated differently regardless of whether they are in transit? And why does an importer have more of a right to avoid one specific kind of tax than an exporter, an in-state producer, or an out-of-state distributor bringing his goods in-state for distribution to still other states?

POINT 3

THE HISTORICAL CONTEXT OF BROWN v. MARYLAND REVEALS THAT (1) THE GOODS IN THAT CASE WERE IN TRANSIT AND (2) JUSTICE MARSHALL APPROVED OF TAXING IMPORTS ON A NONDISCRIMINATORY BASIS.

Although Justice Marshall never meant to treat importers better than other businessmen, later views of his opinion in *Brown v. Maryland* lie at the center of local government's dilemma. The original package statement, unexpectedly, led courts to be constantly looking over their shoulders. When imports were not directly involved the original package idea was rejected (*Woodruff v. Parham, supra*). When imports were at issue the original package suddenly became the most important doctrine available (*Low v. Austin* [1871] 80 U.S. [13 Wall.] 29, 20 L.Ed. 517, and the overruled

California Supreme Court opinion, which attempts to use the policies involved, *Low v. Austin* [1871] 1 Calif. Unreported Cases 642). We have already determined that neither the Import-Export nor the Commerce Clause obliges one to discriminate against exporters and domestic businessmen. It is peculiar that *Brown v. Maryland, supra* should cause such differences in treatment and the heated discussion it engenders as well (cf. Crossky, *supra* ; Early & Weitzman, *supra* ; Prof. Henry M. Hart, Jr., *supra*. Justice Marshall's opinion has not been given rave reviews, and its effects in the field of imports have been seen as inconsistent (Prof. Thomas Reed Powell, *supra*.

These amici hold an alternative view of the opinion. An examination of the historical setting of *Brown v. Maryland (supra)* and a close reading of the opinion yield two conclusions. 1.) The goods in that case were not at rest, but still in transit in the modern usage of that concept. 2.) The examples used to show when taxability would occur were examples of when the goods would be taxed on a *nondiscriminatory* basis.

A review of the commercial setting at the time of *Brown v. Maryland* will make Justice Marshall's intentions regarding the Import-Export Clause clear.

The decision itself recognizes that changing factual circumstances may change the outcome of a case.

> "The power and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinctions between them. Yet the distinction exists, and must be marked as the *cases arise. Till they do arise, it might be premature to state any rule as being universal in its application.*" (Emphasis added.)

Justice Marshall went on to say,

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state. . . ."
> (25 U.S. at p. 441, 6 L.Ed. at p. 686.)

The Court invites a review of the evidence, and does not force one to mouth tests which may have changed their meaning.

Such a review reveals that the commerce of 1827 was a far cry from today's. Ordinarily, the merchant who was actually planning on retailing the goods from his store would act as importer, shipowner, and even buyer (*Murr, Export/Import Traffic Management and Forwarding,* pp. 3-7). The warehouse that he used was almost universally a dockside affair meant almost exclusively as a holding point after the goods were unloaded from the ship and awaiting further transportation (Ackerman, *Understanding Today's Distribution Center,* p. 2). Clearly, goods in such a warehouse and awaiting transportation in their shipping containers, are in transit (cf. *C.F. May v. New Orleans* [1900] 178 U.S. 496, 44 L.Ed. 1165, 20 S.Ct. 976). They are not taxable under any theory since the Commerce Clause rules for interstate commerce would apply to the imports as well.

It is difficult to realize what a transformation in commerce resulted from railroads between 1830 and 1860. Perhaps, it is a natural inclination to believe that not much could happen during such a time. But, clearly, the industrial revolution was in full sway. Those warehouses which were mere waiting places were suddenly found inland along railroad sidings not acting as holding places for goods in their shipping containers or stacked together, as they were in the ship, but a place of feverish activity, where goods were sorted and made ready for any destination an order might call for. By the time of *Low v. Austin* (1871), *supra,* the importer's warehouse was no longer a holding area but a distribution center. (Ackerman, supra, p. 2.)

But the Court in *Low v. Austin* saw only that there was a warehouse and that it belonged to the importer. Its function was entirely different, but the Court applied the same rule to it. Justice Marshall never intended his illustrations to be taken out of context to discriminate against domestic producers and coastal state residents.

History has changed the distribution center even more today. The sea van can avoid double handling. Although the evidence before the trial court was to the effect that truck trailers may be loaded on ships, as well as sea vans (or cargo vans, cargo containers, etc.), the fact is that they have created another revolution in the transportation industry (cf. Vandenberg, *Containerisation, A Modern Transport System),* and the declaration of Ronald A. Tippie contained in the Clerk's Transcript on appeal, California Court of Appeal. 2d District, 2d Civ. No. 46268, included herein as Appendix A). The ability to swiftly move goods inland without breaking the unit of transportation and without double or triple handling has allowed the goods to be moved in their shipping container beyond the boundaries of the port state, overnight if necessary. The Petitioner in this case, for instance, was not forced to have its distribution center at Savannah, or any other port. It has its distribution point for the six southeastern states in a small inland town. Its distribution point for many of the plains states is Johnson County, Kansas. (See *Michelin Tire Corp. v. Board of County Commissioners, etc., et al.* [Dist. Court of Johnson County [1975] Nos. 54594, 56432,

58006, 59905, wherein goods under these same conditions, both packaged and unpackaged, were held taxable, referred to in the brief of Amicus Curiae, State of Kansas.)

Although the importer/distributor may wish to place his distribution center in some large city (almost all of our largest cities are near coastlines), it may choose to put them as far inland as his economic necessities dictate (Vandenberg, supra, p. 23).

There is only one usual stopping place before the goods are unloaded at the distribution center and that is at the container yard where the cargo containers are unloaded and held until a truck, with a specially designed chassis, can come for them. If they are not sold or used by the importer/distributor for his benefit, all will agree that they are not taxable there. The container yard (CY or CFS) is the modern counterpart of the "warehouse of the importer" of 1827 (see Appendix A). Its purposes are precisely the same. If in 1827, the goods were taken out of their shipping container, it would indicate that the goods were available for the owner's use, in state or out. The same is true if the owner took them out and began to sell them either as a peddler or auctioneer. There is little doubt that some of those goods, taken out of their shipping boxes might be sold to someone from another state, either at the merchant's store or in the other state by the peddler. Still, they would be taxable in the port state, be-

cause they had terminated their import journey and were available for the use of the importer, who was, incidentally, no longer acting on the goods as an importer but as a merchant.

In actual fact, *Brown v. Maryland, supra,* did lay down the same rule as *Minnesota v. Blasius, supra.* It may be argued that Justice Taney did not agree with this position, that he felt that the imported goods should be protected to the point of their ultimate consumption. It is true that he made such comments, but he did so believing that *Brown v. Maryland, supra,* did not apply to ad valorem property taxes. (See *Licenses Cases* [1847] 46 U.S. [5 How.] 504, 576, 12 L.Ed. 256, 288, and argument, infra.)

Justice Black also implied this in his dissent in *Hooven and Allison v. Evatt* (1946) 324 U.S. 652, 688, 89 L.Ed. 1252, 1276, 65 S.Ct. 870.

The problem with this ultimate consumption rationale is that it does not serve any policy of the Import-Export Clause since consumers may still have to pay the importer/manufacturer for the tax in *Youngstown.* The rationale does not square with what Justice Marshall meant to hold as shown by the historical context of *Brown v. Maryland, supra.*

It is apparent, then, that the state's power to tax goods which may be destined elsewhere is equal, whether the goods be exports, imports, or interstate exports and imports. It should also be noted that some cases involve importation

of goods solely to the state in which they are taxed (cf. Stipulation of Facts, *Hart v. County of Los Angeles,* Los Angeles Superior Court No. C 83087 attached as Appendix B, p. 28). Here, even the "ultimate point of consumption rationale" serves as no bar to a tax; and yet, Courts have clung to the original package concept, despite this fact.

Perhaps, even in the face of all of this, it may be thought that Congress should have the right to give an importer preferential treatment, not accorded to United States citizens, or that one group of citizens should be allowed certain privileges not accorded to others. Such treatment would run contrary to both the Tenth and Fifth Amendment (see argument infra). But there is additional evidence that even when the United States has been in an exceptionally strong negotiating position, they have not asked other countries' citizens to surrender their rights, compared with United States citizens. (See *Snow, Treaties and Topics in American Diplomacy* (1894) pp. 50, 117, 127, 129, 178, 183, and the General Agreement on Tariffs and Trade, the Preamble, and Part II, Article III, Paragraph 2. Research has revealed no treaties whereby Congress has given any country preferential trading rights vis-a-vis United States citizens.

The importer, by paying his customs' duties, has a right to be as free from other taxes as any domestic manufacturer/distributor, not freer. He has the right to sell his goods, once Federal imposts are paid, on an equal footing with his domestic counterpart, not higher. And he has the

right to as much exemption from taxes while the goods are on their way as an American trader, not more.

The inland consumer has the right not to pay a tribute to another state, whether that tribute be imposed on domestically produced goods on their way to him or imported goods. But he is not free from the cost of getting goods to him, and there is no rationale which places the "inland" buyer of imported goods in any better position in this regard than an "inland" buyer of domestically produced goods shipped intrastate. All of these inconsistencies will be resolved when the nature of commerce in 1827 is recognized. *Brown v. Maryland*, *supra*, may stand for the proposition that the present interstate rules are the same as those which should have been the rules for foreign imports.

There is another equally cogent reason to come to this same conclusion. Justice Marshall's opinion stresses the importance of "mixing" the goods with domestic goods. Even the examples of the peddler and the auctioneer are used with this mixture in mind. From this thought has grown a "rule" for determining taxability. *Youngstown Sheet & Tube Co. v. Bowers (supra)* 358 U.S. at p. 549, 3 L.Ed.2d at p. 500-1, 79 S.Ct. at p. 392 shows this same concern. Yet, rationally, mingling the imported goods would not seem to make them any less imported, nor even any less at their "ultimate" destination.

The effort to understand *Brown v. Maryland* is made easier when it is remembered that a primary form of state

taxation was the license or occupation tax. Research has revealed no ad valorem property assessments of goods held for sale (Ely, *Taxation in American States and Cities*, p. 41; Digest for Pennsylvania Laws 1700-1830; Maine Revised States 1841, Maryland Laws 1692-1839; Laws of Vermont 1824; Massachusetts Laws 1823; Laws of Massachusetts 1822-1835; Revised Statutes of New York 1829; Rhode Island Public Laws 1822-1842; Statutes at Large [Virginia] 1831-1832; North Carolina Laws 1829-1832; North Carolina Laws 1827-1818; New Hampshire Laws 1822-1827; Georgia Laws 1827-1828; Delaware Laws 1827-1829; Statutes of Connecticut 1821.) The single exception appears to be South Carolina (South Carolina Statutes, Vol. 6, 1814-1838, p. 96).

When the goods are in the hands of an importer who is also dealing with domestic goods a tax upon his occupation (peddler or auctioneer) will not reach imported goods per se, but upon domestic and imported goods on a nondiscriminatory basis. With this understanding the examples become clear. Justice Marshall saw that a license tax could be imposed discriminatorily, and he blocked that effort. But he never meant to rule on the applicability of our present system of property taxes, because he never saw it. The breaking open of the shipping container has reinforced his idea but not because an "inland" consumer would never be effected. In fact, it may have been that that "inland" consumer would ultimately pay a tax imposed after the goods were taken from such containers.

Justice Marshall was confident, however, that the goods in such containers were not mixed up with other goods thereby rendering any occupation tax discriminatory. He said as much (25 U.S. [Wheat] at p. 441-2, 6 L.Ed. at p. 686). But for the next 150 years no one listened.

The effect of this interpretation is to prohibit *any* discriminatory tax, such as that involved in *Department of Revenue v. James B. Beam Distilling Company* (1964) 377 U.S. 341, 12 L.Ed.2d 361, 84 S.Ct. 1247. The Commerce Clause would then be sufficient to prohibit any tax, whether discriminatory or not, while goods were in transit, or had interrupted their journey only to obtain further transportation.

The alternative is the holding that the Import-Export Clause prohibits taxation of goods while in transit. This, surely, is closer to the original intent of both the Framers and Justice Marshall than rules laid down blindly with little recognition of the policies of the Clauses.

POINT 4

THE IMPORT-EXPORT CLAUSE WAS NEVER MEANT TO APPLY TO AD VALOREM PROPERTY TAXES

There is another reason why the Import-Export Clause should not bar nondiscriminatory ad valorem property

taxes: Neither "impost" nor "duty" were meant to include property taxes. The most searching historical study of this point is to be found in Crossky, *Politics and The Constitution in The History of the United States, supra,* pp. 295-323. The sources used in that author's treatise are convincing proof that the Framers of the Constitution had no intention of depriving the states of the right to assess property (see also Early & Weitzman [*supra*], Prof. Hart [*supra*], and Prof. Powell [*supra*]).

The Constitution of the United States gives to the Federal Government power to lay "taxes, duties, imposts and excises"(Article I, § 8) but prohibits the states from imposing imposts and duties. All historical authority points to the fact that property assessments are neither imposts nor duties (E. G. *Crossky, supra),* and were not meant to include general taxes of a nondiscriminatory nature.

It is important to realize that *Brown v. Maryland* (1827), *supra,* first distinguishes between "imposts" and "excises," but holds the excise in question to be an impost in substance because it is directed specifically at imported goods, i.e., it discriminates against them. This emphasis upon discriminatory taxes grew out of the Constitution and the Constitutional debates. Duties were specifically defined as stamp taxes while imposts are taxes specifically directed at imported goods (cf. Martin, Debates, pp. 51, et seq).

In giving up the right to lay imposts and duties, the states were not under the impression that they would be giving up the right to assess property within its territory. This is evidenced by the comments of Governor Ellsworth at 2 Madison, Debates 192 and 195. These words are also quoted in *Woodruff v. Parham, supra:*

> At page 196, he states:
> "It is a strong argument in favor of an impost, that the collection of it will interfere less with the internal policy of the state than any other species of taxation. It does not fill the country with revenue officers, but is confined to the sea coast, and is chiefly a water operation. . . "

The *Woodruff* Court goes on to say, in connection with its reasoning, that imposts and duties do not apply to interstate commerce:

> "It is not too much to say that, so far as our research has extended, neither the word 'export,' 'import' or 'impost' is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special

> form of words to show that *foreign* commerce is not meant." (Emphasis added.)

In fact, *Woodruff v. Parham* argues strongly that the Import-Export Clause in general, and, therefore, imposts and duties, was never meant to apply to domestically produced goods. The inference is clear. Imposts, a tax directed specifically at imports, and duties, a type of stamp tax, were never to be used by the states. It is equally clear that a nondiscriminatory ad valorem assessment is neither an impost nor a duty as those words were used when the Constitution was written, or when Justice Marshall wrote his opinion. It should be noted that Professor Crossky's book is not the only research on this point. These same conclusions are also made both by Judge Early (Early & Weitzman, *supra*, and by Prof. Powell (Powell, *supra*).

It may be asserted that *Richfield Oil Company v. State Board of Equalization* (1946) 329 U.S. 69, 91 L.Ed. 80, 67 S.Ct. 156, is dispositive of this definitional question. There, the Court said:

> "It seems clear that we cannot write any . . . qualifications [regarding the discriminatory nature of the tax] into the Import-Export Clause. It prohibits every state from laying 'any' tax on imports or exports without the consent of Congress.

> Only one exception is created – 'except what may be absolutely necessary for executing its inspection laws.' The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax." (329 U.S. at p. 76.)

The decision acknowledges that the Import-Export Clause was defended at the Convention and in other debates on the basis that "levies" would be prohibited (329 U.S. at p. 76

But, in noting 2 Farrand, *The Records of the Federal Convention* (1911) pp. 307, 359-362, 442; 3 Elliott's *Debates* 2d Ed. p. 483; and *The Federalist No. 42,* the *Richfield* Court did not point out that Article I § 10, Clause 2 does not refer to "taxes," but to imposts and duties. In fact when Article I § 9, Clause 5 refers to taxes, it supports the concept that there is a difference between the ambit of the two sections. Of course, *Richfield Oil Corp. v. State Board of Equalization* was still decided on the basis of when transport began, and no consideration of the shipping containers was even required.

The Court referred not to imposts or duties, however. Actually, it leapt to the conclusion that impost means any tax – a conclusion often reached on the basis of today's rather imprecise usage of the word. Professor Crossky's study and the other material cited herein make it abundantly clear that they are not the same.

These amici curiae believe that such conclusions are based upon the language in *Brown v. Maryland, supra,* to the following effect:

> ". . . but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a *tax* upon it is too plainly a duty on imports to escape the prohibition in the Constitution." (25 U.S. at p. 442, 6 L.Ed. at p. 686.)

What is clear from this quote, in the context of the decision, is that Justice Marshall, although correctly determining that the tax in question was worded as an excise, also determined that it was directed at imports. The statement, on its face, appears to conclude that *any* tax laid upon goods before they have been taken out of transit is contrary to the Import-Export Clause.

However, Justice Marshall did not have any tax in

mind. We have seen that there were no ad valorem assessments on inventory or any personal property for sale in existence in 1827. (See Ely, supra; and State Laws of 1827, supra.)

The only tax with nondiscriminatory effects which Justice Marshall considered was that placed on all auctioneers and peddlers, some of whom might sell the imported goods in their original package. This tax he thought to be valid.

It has been the interpretation of this Court that any state tax laid upon goods while in transit is contrary to the Commerce Clause. These amici curiae believe that imports from foreign countries are also protected from any tax while in transit and further protected from any impost or duty by any state forever. It is clear that this is what the Framers of the Constitution had in mind.

The fact the Constitutional prohibition on imposts and duties is so complete is further evidence of the narrow usage of the terms. When Justice Marshall expanded the prohibition to excises he was only concerned with the discriminatory ones. He held, for instance, that a tax on auctioneers was clearly valid. In *Cook v. Pennsylvania (supra)*, this Court determined such a tax to be invalid. The Court, sensing the evidentiary nature of Justice Marshall's example did not hold the auctioneers' tax valid because *Brown v. Maryland* said it should be. The Court found the tax to be *discriminatory* against imported goods. That discrimination was the key

difference between Justice Marshall's example and the facts in that case. The Court was able to look to the intent of the Import-Export Clause and see a change in the relevant evidence between the two cases.

POINT 4a

THE IMPACT OF LATER EXTENSIONS OF THE IMPORT-EXPORT CLAUSE

It can readily be seen from the discussions of the intention of the Framers of the Constitution that the narrow definition of imposts and duties was meant and that the states were absolutely prohibited from using tehse devices on imports and exports, not just until they were mingled with the property of the state, but forever. In short, taxation which discriminated against imports or exports was a function of the Federal Government. The ambit of the Import-Export Clause, as originally conceived, was, indeed, different. The Import-Export Clause would never have prohibited ad valorem property assessments. (See Crossky, *supra*). But the Commerce excludes any taxes, including ad valorem property assessments, if they tend to interfere with Congress' authority to regulate commerce.

We have seen why Justice Marshall laid such

emphasis on the mingling. We have also seen that the goods in *Brown v. Maryland, supra,* were in transit and were protected by the Commerce Clause. In either case such a tax on goods in transit would indeed discriminate against inland states. The resident of an inland state who dealt in the coastal state only to move his goods out of that state to his store would be at a disadvantage from such a tax. But at the opposite end of the spectrum are Justice Taney's comments in the *Licenses Cases* (1847). 46 U.S. (5 How.) 507, 12 L.Ed. 256:

> "Undoubtedly, a state may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade or of imported goods which he proposes to sell, or of any other property of which he is the owner. . . ."
> (46 U.S. at p. 576, 12 L.Ed. 288.)

Justice Taney emphasized the impropriety of taxing goods while in transit, a Commerce Clause prohibition. Goods destined only to inland merchants which were in dockside warehouses were immune. It was also clear that he

was considering license and occupation taxes in their discriminatory sense. At this point the Commerce and Import-Export Clauses still had very different functions and were not coterminous.

The case which ignored Justice Taney's remarks and led to the idea that the Import-Export Clause prohibits any tax on imports or exports when not in transit was not *Low v. Austin, supra,* as so many believe, but *Woodruff v. Parham* (1869) 75 U.S. (8 Wall.) 123, 19 L.Ed. 382. That case ruled that a nondiscriminatory tax on property was valid, even though the property consisted of imports from other states.

Now, if nothing else about the Import-Export Clause is clear, it is clear that imposts on interstate imports and exports were just as much prohibited as foreign imports and exports. (See Crossky, *supra).* A tariff on interstate imports could be just as discriminating as one on foreign imports; and when it is remembered that the roads in early America were poor at best, it is seen that the position of the port cities vis-a-vis inland towns was just as critical for interstate commerce as for foreign.

The Court in *Woodruff v. Parham* would have prevented much confusion if it had simply recognized that all of the excises of the time were scheduled profession by profession and, except where imports were at the point where they

were treated side by side with domestic goods (e.g., peddler and auctioneer), any of the usual excises by profession would have been discriminatory. The Court also forgot that its view of the world had been drastically altered and that the railroad had changed commerce and the use of warehouses considerably. Such forgetfulness is natural.

It is particularly natural when Justice Marshall laid down a guideline with the words ". . . is too plainly a duty . . . " Such strong language was, and still is, a deterrent to thinking about the reasons for things. Instead, the Court took the much easier ". . . we suppose the principles laid down in this case, to apply equally to importations from a sister state." Of course, stare decisis, particularly stare Marshall decisis, was of even more vital importance than it is today. The *Woodruff* Court took the easy way out, but left a hard problem behind them.

That problem came before the Court in *Low v. Austin, supra.* The Court was unable to answer the California Supreme Court's argument to the effect that a nondiscriminatory tax did not by its very nature discriminate against imports and was, therefore, not in the ambit of the Import-Export Clause or *Brown v. Maryland.* The United States Supreme Court was also unable to deal with the logic that the original package "doctrine" as applied to imports did nothing to prevent higher prices inland, and that higher prices inland were not necessarily bad.

Instead, they focused on the "right to sell" argument. The Court stated simply that the importer had the right to sell his goods in their unbroken containers. As we have seen, this contention has precious little to do with the purposes of the Import-Export Clause. If it has something to do with the Commerce Clause, it is only that it allows the importer to sell on an equal footing with United States citizens, no more. But the *Low* Court had to go beyond this in order to sustain Justice Marshall's reasoning. A reading of the California Supreme Court opinion will convince one that the Court was unsure of Justice Marshall's reasoning. They were sure he meant to say that nondiscriminatory taxation was not barred by the Import-Export Clause. But they thought that the mingling argument and the statement that "taxes" were barred were somehow inconsistent with each other. They are, of course, until one remembers that there were no nondiscriminatory taxes in existence until the goods were mingled to be treated by the peddler or auctioneer alike with domestic goods.

So it is logical to assume that the *Low* Court, concerned with the awesome shadow of Justice Marshall and fenced in by the logic of the *Woodruff* Court, should stand its ground and reject the logic of the Court below. The Low Court ignored the fact that the goods were consigned rather than sold to the importer/distributor and ignored the harm to domestic producers.

What follows is, of course, logical. Courts by the score have failed to see *Brown v. Maryland* as laying down evidentiary guidelines, as dealing with the facts as they were in 1827, and have applied the original package concept, not like the evidence it was originally supposed to have been, but as dogma.

This Court has often referred to the Import-Export Clause as prohibiting a tax on "things" whereas the Commerce Clause prohibits taxes which interfere with Congress' regulation of commerce. Much is made of this distinction (cf. *Hooven and Allison v. Evatt, supra.* This is, no doubt, the result of the *Brown v. Maryland* concept of imports being such only until "mingled" with the property of the state. There is certainly nothing in the Import-Export Clause to indicate that the status as an import ceases at some time. Whatever its source, it does not follow that making such a distinction must mean that taxability under the Commerce Clause must be different from taxability under the Import-Export Clause.

Originally, of course, they were different. But subsequent enlargement of the ambit of the Import-Export Clause has caused it to take on some of the functions of the Commerce Clause. At the same time, the prohibition of the Import-Export Clause has been called into play with less and less attention paid to its reasons for being. The one principal excep-

tion to this is *Youngstown Sheet and Tube Company v. Bowers, supra.*

Hooven and Allison Company v. Evatt, supra, on the other hand, gives attention to the idea of the original package, while discussing whether the hemp was still an import. It was brought out that the Import-Export Clause was a prohibition of a tax on a "thing," i.e., imports, and, therefore, the discussion must center on when goods cease being imports. But ceasing to hold the status of an import is not a function of packages directly. It is a function of the policies behind the Import-Export Clause in particular and the Constitution in general. *Brown v. Maryland* asks us to go farther than the ordinary meaning of the word "package." It asks us to relate our discussion to the policies of the Constitution. Justice Marshall not only drafted his examples in the light of 1827's commercial and taxing procedures, but he also drafted them in light of the Constitution.

POINT 5

THE EFFECT OF APPLYING THE ABOVE ANALYSIS TO THIS CASE WILL BE TO MAKE THE ORIGINAL PACKAGE TEST MORE MEANINGFUL

All of the above may lead some to respond that these amici curiae wish to end the original package "doctrine."

As a formula, recited without actual meaning, these amici curiae would be pleased to see the end of such irrelevant dogma. It should be said, however, that goods still being in the form ready for further shipment, without being exposed to sale or otherwise at the disposal of the owner, may be sufficient to hold that they are still in transit, and, therefore, protected by the Commerce Clause. These amici do not feel that nondiscriminatory taxes are barred by the Import-Export Clause But even if they are, a full reading of *Brown v. Maryland* and its historical context should be sufficient to convince anyone that the extent of that protection goes only as far as the point where transit ends, and the goods are at the disposal of their owner. There is absolutely no reason supporting the Import-Export Clause, which carries any prohibition of a nondiscriminatory tax any further.

One may believe that the original package evidence should be used as a rule, and should apply equally to both discriminatory and nondiscriminatory taxes for the sake of uniformity. It should be clear by now that the Framers of the Constitution did not intend for nondiscriminatory taxes to be effected. Once expansion goes beyond the intent of the Framers of the Constitution any proposed "rules" should be closely scrutinized to determine whether they comport with the policies of the Constitutional provision being interpreted. If there is no reason other than a feeling that "things should be neat" to prevent state action, the proposal should be rejected and a more flexible approach should be taken.

The original package concept may have a place in determining whether transit has ended for the purpose of the Import-Export Clause or the Commerce Clause. That place was never meant to be any more than an evidentiary one, as set forth above. To elevate a piece of evidence to the status of an unvarying rule does a disservice not only to the states which have been left with the remaining powers not specifically enumerated in the Constitution, but also to Justice Marshall.

He was wise enough to know that circumstances change.

POINT 6

OTHER METHODS OF CONSTITUTIONAL INTERPRETATION LEAD TO THE CONCLUSION THAT DISCRIMINATING AGAINST UNITED STATES RESIDENTS, DOMESTIC PRODUCERS AND INTERSTATE IMPORTERS IS INCONSISTENT WITH THE REST OF THE DOCUMENT

POINT 6a

CONSTRUCTION OF ARTICLE I, § 10 CLAUSE 2, SO AS TO PROHIBIT A NONDISCRIMINATORY AD VALOR-EM TAX WOULD VIOLATE THE TENETS OF EQUAL PROTECTION AND THUS CREATE AN INTERNAL CONSTITUTIONAL INCONSISTENCY

It is axiomatic that the Constitution must not be construed in such a manner as to "defeat rather than effectuate the constitutional purpose." (*United States v. Classic*, [1941] 313 U.S. 299, 85 L.Ed. 1368, 61 S.Ct. 1031). Thus, potentially conflicting constitutional provisions must be interpreted in a consistent manner in order to further said constitutional purpose.

If Congress, rather than the Supreme Court were to partially prohibit a non-discriminatory ad valorem tax levied on all goods within a state, said prohibition would violate the Fifth Amendment's implied guarantees of equal protection. (See *Frontiero v. Richardson* (1973) 411 U.S. 677, 36 L.Ed. 2d 583; 93 S.Ct. 1764). The fact that such a breach of equal protection would be the result of adoption of Petitioner's interpretation of Article I, § 10, Clause 2, rather than from a statute enacted by Congress, makes the wrong no less burdensome.

As indicated previously in this brief, the prohibition on a nondiscriminatory ad valorem tax would not only discriminate against domestically produced goods (by giving the imports a price advantage), but would also force the citizens of the coastal states to subsidize the cost of the imported goods by paying taxes in order to provide "free" police service for the importer. It is also true that citizens of "inland" states would also bear some of this cost, if they buy U.S. goods which were distributed from or through a "coastal" state.

In order to show a violation of equal protection, we must analyze the purpose of Article I, § 10, Clause 2 (analogous to a legitimate state interest), compare it with the interpretation advocated by the Petitioner (analogous to the means used to attain the legitimate end), and then determine whether or not the interpretation is rationally related to the purpose.

The prohibition against states levying an impost or duty on imported goods has, as documented elsewhere in this amicus brief, a twofold purpose: Prevention of discrimination against inland states; and preservation of the exclusive authority to raise revenue through imposts by the Federal Government.

The interpretation by the Petitioner of Article I, § 10, Clause 2 (i.e., the means of attaining this dual purpose), prevents any form of taxation upon imported goods before sale while such goods are in the "original form" or their "original packages."

Despite the fact that such an interpretation prevents a nondiscriminatory ad valorem tax only on imported goods within a state, thereby discriminating against domestic goods and citizens of coastal states (as shown supra), said interpretation is not violative of equal protection if it is rationally related to the legitimate purpose of Article I, § 10, Clause 2, of the Constitution.

Rational relationship, as evidenced by the plethora of Supreme Court decisions in this area, has no single meaning. However, rational relationship, in its most traditional sense (i.e., "mere" rational relation) calls for a minimal nexus between the Petitioner's interpretation and the legitimate purpose (*Kotch v. Board of River Port Pilot Comm'rs* [1947] 330 U.S. 652, 91 L.Ed. 211, 67 S.Ct. 504.) While, undoubtedly there is *some* relation between the means and the purpose in this case, it can hardly be called rational, even in the traditional sense. This Court, in *Phila & Reading R. Co. v. Pennsylvania* (1873) 82 U.S. (15 Wall.) 284, 21 L.Ed. 164 recognized the absence of a rational relationship when it stated:

> "And yet if the states may tax at pleasure imported goods, so soon as the importer has broken the original packages and made the first sale, it is obvious the tax will obstruct importation quite as much as would an equal impost upon the unbroken packages before they have gone into the markets."

Thus, as early as 1873, the Court recognized the disparity between the purpose of "Import-Export Clause" and the interpretation used to attain that purpose.

This disparity becomes even more obvious when contemporary standards of the rational-relation test are used. Assuming, *arguendo,* that Petitioner has satisfied the threshold requirement of showing a traditional rational relation, recent decisions of this Court indicate that the means utilized (i.e., Petitioner's interpretation of Article I, § 10, Clause 2) must be necessary to bring about the legitimate purpose. (*Bullock v. Carter* (1972) 405 U.S. 134, 31 L.Ed. 92, 92 S.Ct. 849.) This showing of necessity may be achieved only if Petitioner can show that there are no less burdensome alternatives. (*Lubin v. Panish* (1974) 416 U.S. 709, 39 L.Ed.2d 702, 94 S.Ct. 1315.) That is, if the dual purpose of Article I, § 10, Clause 2, can be realized without causing discrimination against domestic goods or against citizens of coastal states then the requisite of necessity, necessary to sustain Petitioner's interpretation, cannot be met.

In fact, by allowing a nondiscriminatory ad valorem tax when the goods are at rest and available to the owner for sale or distribution, the Court would alleviate the discriminatory burdens cited above and, as pointed out by this Court in the case of *Phila & Reading R. Co., supra,* achieve the same purposes intended by the Framers of the Constitution as could be attained by Petitioner's construction.

Through employment of this analysis, it is obvious that a Federal statute, adopting Petitioner's interpretation of the "Import-Export Clause," would violate equal protection. If the Court were to adopt the Petitioner's interpretation, an internal inconsistency between Article I, § 10, Clause 2, and the Fifth Amendment, would develop. Such inconsistency would, in fact, "defeat rather than effectuate the constitutional purpose."

POINT 6b

THE POWER OF PROPERTY TAXATION, RESERVED TO THE STATES BY THE TENTH AMENDMENT, WHEN VIEWED IN HISTORICAL PERSPECTIVE, ALLOWS NONDISCRIMINATORY TAXATION ON IMPORTED GOODS

The basic premise of the "Reserve Clause" has been expounded by this Court: "The Tenth Amendment 'states but a truism that all is retained [by the states] which has not been surrendered.'" (*U.S. v. Darby* [1940] 312 U.S. 100, 124, 85 L.Ed. 609, 622, 61 S.Ct. 451, 462; *Case v. Bowles* [1945] 327 U.S. 92, 102, 90 L.Ed. 552, 560, 66 S.Ct. 438, 443.) In order to determine exactly what has been retained by the states we must, of necessity, view the constitutional limitations in light of the meaning attributed to the words by

the Framers of the document. (*W., P. and Cin. Trans. Co. v. Wheeling* [1878], 99 U.S. 273, 25 L.Ed. 412, wherein the Court stated that in order to determine the meaning of "taxation on tonnage," the Court must look to the intent of the Federalists.)

In depth analysis of the meaning of the Import-Export Clause indicates that the Framers did not intend a prohibition on "imposts" and "duties" to act as a prohibition against the levying of a nondiscriminatory ad valorem tax. (W. Crossky, *supra.*) This insight, contributed by Professor Crossky, coupled with the historical research of these amici curiae (set forth *supra*) clearly indicate that a nondiscriminatory ad valorem tax was not meant to be prohibited by Article I, § 10, Clause 2, of the Constitution. It follows logically, therefore, that the power to levy said nondiscriminatory tax is reserved to the states.

The dissenting opinion in *Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co.* (1968) 394 U.S. 369, 22 L.Ed.2d 344, 89 S.Ct. 1109, pointed out that, though "[s]tates' rights are often used as a cloak to cover unconstitutional encroachments," obviously not all uses of said concept inure to the detriment of the Constitution. Moreover, the opinion went on to state that "the Court, mindful of the force of the Tenth Amendment and the place of the States in our constitutional system, *has resolved close cases in favor . . . of the states . . . .* " (Emphasis added.) Thus, even if the in-

tent of the Framers to reserve the power of nondiscriminatory taxation were not made obvious by Professor Crossky, "close cases" should be decided in favor of the state.

Even if the research of Professor Crossky and the intent of the Framers is rejected, an interpretation of *Brown v. Maryland (supra)* to the effect that nondiscriminatory taxes are barred only until the goods come to rest and are at the disposal of the owner, achieves the ends of the Constitutional provision. The interpretation offered by the Petitioner would take away the power reserved to the states without reason. The Import-Export Clause's objectives will be achieved by ending the prohibition of *nondiscriminatory taxes* at that time. Discriminatory taxes were obviously meant to be prohibited forever.

POINT 6c

ARTICLE I, § 10, CLAUSE 2, SHOULD BE INTERPRETED SO AS TO BE CONSISTENT WITH ARTICLE I, § 9, CLAUSE 5

Both portions of the Constitution effect exports. Article I, § 9, Clause 2 states: "No *tax* or duty shall be laid on Articles exported from any State." This Court in *Peck v. Lowe* (1917) 247 U.S. 165, 62 L.Ed. 1049, 38 S.Ct. 432, allowed a Federal income tax on an exporter, which income was derived, in part, from sales in foreign commerce. Part of

the Court's rationale was based on the fact that the tax was nondiscriminatory and would effect exports and other goods equally.

In this case, there are domestically produced goods stored side by side with imported goods. A property tax would, like the income tax in *Peck v. Lowe, supra*, effect both the imported goods and the domestically produced goods equally. Holding that Georgia's nondiscriminatory ad valorem property tax is not valid would be inconsistent with Article I, §9, Clause 5. The Court would be ruling that Congress was somehow not prohibited as much as the states. In this regard, it should be noted that the Congress is prohibited from any tax, while the states are prohibited from imposts and duties only. Why, in the face of all this, Congress would have more power is not clear.

It may be argued that exports should be treated differently than imports. The difficulty with this rationale is that there is every reason, economically, to favor exports over imports. That is, no doubt, why Congress was not precluded, in Article I, §9, Clause 5 from laying taxes on imports. The Constitution itself indicates that exports are to be placed on a better footing than imports. Yet imports, by Court decision, have been given special privileges beyond anything any treaty gave them, beyond anything the Framers thought of, and beyond any reason supporting any part of the Constitution.

POINT 6d

ARTICLE I, § 10, CLAUSE 2, SHOULD BE INTERPRETED CONSISTENTLY WITH ARTICLE I, § 10, CLAUSE 3

This Court in *Clyde Mallory Lines v. Alabama* (1935) 296 U.S. 261, 80 L.Ed. 215, held what was in effect a tonnage duty imposed by Alabama to be valid. There can be no doubt that that case involved a charge based upon the tonnage of the vessel concerned. There is also no doubt that the basic policies of Article I, § 10, Clause 2 and Clause 3 are the same (*Clyde Mallory Lines v. Alabama, supra,* 296 U.S. at pp. 264-265, 80 L.Ed. at p. 217-8, 56 S.Ct. at pp. 195-196). The Court went beyond that, however, and validated the duty on the ground that its proceeds were used for the purpose of maintaining the harbor facilities and that the duty constituted a charge for the use of those facilities. It did not matter to the Court that the actual money given by the carrier may well not have been used to support the specific part of the harbor that the vessel was using.

That decision did refer to the charges not impeding the free flow of commerce. Despite the obvious increase in the importer's cost, this tonnage duty was not held to be impeding commerce. The only possible rationale is that the duty was nondiscriminatory and bore *some* relationship to the cost of maintaining the local facility.

In like manner, a property tax serves to pay for the protection and maintenance of a locality. The importer/distributor gains the benefits of that protection, and his payment goes into the same general fund which provides the services of which it has the advantage. It may be argued that property taxes pay for many things. It is true. It is also true that the duty in *Clyde Mallory Lines v. Alabama, supra,* also, no doubt, paid for many things of which the carrier did not receive the benefit. There is little distinction between the two taxes. (cf. Cases cited in *Clyde Mallory Lines v. Alabama* for the proposition that charges levied by states to defray costs of regulations or of facilities afforded in aid of interstate or foreign commerce are permissible. Protection of these goods and maintenance of highways are such facilities. The harbor in *Clyde Mallory Lines v. Alabama* may be used by in-state people as well as out-of-state people, and that makes no difference in the validity of the duty.)

The only question remaining is whether the amount of the tax was consistent in general terms with the services rendered. Taking into consideration the protection of all of the importer's/distributor's goods, $10,000.00 per year is adequately related to the police and fire protection the goods received, and the road maintenance, which allowed the goods to get into Lawrenceville and out when they were sold.

POINT 7

THE APPLICATION OF YOUNGSTOWN SHEET AND TUBE CO. v. BOWERS, SUPRA, TO THIS CASE IS PROPER

We have noted above that *Youngstown Sheet & Tube Co. v. Bowers, supra,* directed its attention to at least one of the policies behind the Import-Export Clause. Of course, it explicitly declined to rule on imports for sale. But its rationale is quite important and relevant.

In *Youngstown,* the importer/manufacturer/wholesaler brought goods [ore] from abroad. The goods were unloaded at port facilities and then carried to the Appellant's yard where they were kept. Out of the stack of goods, the Appellant drew some materials to periodically fill its needs.

All of these facts are exactly those of this case.

There are two possible distinctions between this case and *Youngstown:* 1.) Some of the goods at Michelin's warehouse were in cardboard boxes; and 2.) *Youngstown* put the goods through a manufacturing process before selling them. We must assume that the eventual purpose of the manufacturing process in *Youngstown* and the distribution process in the case at bar is to make a profit by selling the product (see Hart, *supra*). One would be hard pressed to conceive of a sit-

uation where the importer/manufacturer/wholesaler in *Youngstown* would refuse to sell to out-of-state customers.

It is clear, then, that in both *Youngstown* and in the case at bar an inland consumer may receive the brunt of the property taxes assessed in the same way. They will also be obliged to ultimately pay the taxes on the domestic goods held by importers. No statements to the effect that the prohibition of the Import-Export Clause "attaches" to imports in their status as such can obliterate this important similarity between the two cases. *Youngstown* stands as a flat rejection of the idea that consumers in other states should not ultimately pay the tax burdens of states to which the goods are imported. Of course, this idea was effectively blocked by *Burke v. Wells, supra,* where an income tax on proceeds from imports was held valid (also see *Clyde Mallory Lines v. Alabama supra*). It is also true that the examples of *Brown v. Maryland* do not preclude some burdens being placed upon "inland" consumers. All of this is true, despite the fact that part of the Court's rationale in *Youngstown* was that the goods were being put to their "ultimate" use. Of course, their "ultimate" use, in the eyes of the Appellant, was their sale as part of the manufactured good. That sale was for the importer/manufacturer/wholesaler's profit.

One may believe that, because the manufacturing process actually "mingles" imported and domestic goods, there is some distinction between that case and this one. Before distinctions are made, however, one should determine

whether those distinctions serve the policies of the Import-Export Clause. We have already seen that there is no distinction which effects the price paid by the "inland" consumer. There is also no distinction which effects the so-called right of the importer to sell. Even if that right were absolute, it has been abrogated in *Youngstown*, for the importer/manufacturer/wholesaler is liable for this and any other nondiscriminatory tax. The last possible policy which might call for asserting the Import-Export Clause's prohibition is discrimination against imports. The actual wrong, which was meant to be corrected by the Import-Export Clause (discrimination against the "inland" states) was meant to be ended by the prohibition. Of course, that policy is never countered by any nondiscriminatory tax.

There is, then, no policy of the Import-Export Clause, no matter how much those policies are stretched, which supports making any distinction between any of the goods involved in this case and those involved in *Youngstown*.

The Petitioner's "ultimate" use of the imports is to sell them (Petitioner's Reply Brief, concerning the acceptance of their petition, p. 3).

POINT 8

THE EFFECT OF APPLYING YOUNGSTOWN TO THIS CASE WILL BE TO ACHIEVE THE PURPOSES OF ARTICLE I, § 10, CLAUSE 2 AND TO LESSEN THE DISCRIMINATION AGAINST DOMESTIC PRODUCERS AND UNITED STATES RESIDENTS

There is one possible objection to applying *Youngstown* to the facts at bar: It will make further inroads into the so-called original package "doctrine." Of course, a correct view of the principle of *Brown v. Maryland* is that the "original package" was itself not meant to be extrapolated into doctrine, but was part of the evidence which led Justice Marshall to conclude that import transit was concluded and the goods were available to the importer for his own purposes. The original package, construed correctly as the shipping container (*C. F. May v. New Orleans, supra*), may still be a part of the consideration of when transit has ended, as it was meant to be in the first place. But it should not be, and was never meant to be, anything more than part of the evidence. If the goods are no longer moving, are unloaded from their method of transport, and are available to the owner for his own purpose (even eventual sale to customers out of state), there is no bar by the Commerce Clause and no policy of the

Import-Export Clause which will be served by not holding them taxable.

Applying *Youngstown* will actually oblige the states to compute "current operational needs" and exclude those goods which are not embraced thereby from property taxes, even though there is no reason for such an added exclusion. Depending upon the state, these reductions could be substantial (cf. *City and County of Denver v. Denver Publishing Co.* [1963] 153 Colo. 539, 387 P.2d 48).

Despite the added burdens on at least some states, *Youngstown* comes the closest of many cases to achieving the ends of the Import-Export Clause.

It may be difficult not to believe that the clause must have some strength, or some use, today, and, therefore, to search for such a use. The fact is, however, that, with the exception of a few cases (cf. *Department of Revenue v. James B. Beam Distilling Company* [1964] 377 U.S. 341, 12 L.Ed.2d 362, 84 S.Ct. 1247), very few states have actually laid imposts on imported products. It actually would make no difference in *Department of Revenue v. James B. Beam, supra,* whether the tax was actually imposed before or after the breaking of the packages. The crucial point of that case was that it dealt with an impost, an obligation discriminating against imports. It would have been just as unconstitutional if it had been assessed at that time the bottles were sold to retail outlets. The Court in that case did refer to *Low v. Austin*. But the Court would

still have been required to strike down the tax even if imposed after the "original package" was opened. The Court would then have been faced with the decision it is faced with here: The decision to distinguish impost from property assessment and to treat them in accordance with their respective purposes.

Applying *Youngstown* to this case will not totally remove the presently existing discrimination against the "distributing states and communities," but it will go a long way towards it. There is surely no reason for not applying *Youngstown.* Unfairness towards these states and communities as well as "inland" buyers of U.S. goods, is substantial reason to apply it.

POINTS 1-8

CONCLUSION

The discussion above has dealt with the objects of the Import-Export Clause. It was clear that the Framers sought to end a particular type of discrimination against the non-port states, which were then in a seriously disadvantaged position vis-a-vis the port states. They ended that discrimination by not allowing the states to lay imposts or duties on imports or exports. It is clear that in order to carry out those purposes, Justice Marshall prohibited discriminatory taxes on imports until they were being treated like other property in the state, whether to be sold to inland customers, or used.

We have already pointed out the fact that serious discrimination against the residents and domestic and interstate distributors must be ended. The two most clear paths to this solution are 1.) a rule to the effect that nondiscriminatory taxation is prohibited by the Commerce Clause and not the Import-Export Clause, or 2.) a rule to the effect that nondiscriminatory taxation is prohibited by the Import-Export Clause only until transit has ended and the goods are available to the owner for his own purposes, whether distribution or other states, sale in the taxing state, or both.

We have also seen that methods of constitutional interpretation, the historical context of that document, of *Brown v. Maryland*, and of later cases, and the decisions themselves lead to the conclusion that there is no reason to prevent the application of such rules. In fact, the discrimination against United States residents and producers is a clear mandate for such rules.

The application of *Youngstown* to these facts is warranted by the same policy considerations. Many states will be obliged to restrict the amount of goods taxed pursuant to cases already decided in their jurisdiction on the basis of *Youngstown:* but, clearly, a current operational needs test satisfies the policies of the Constitution and prevents at least some of the discrimination presently imposed on the localities which are chosen by the importer/distributor as its base of regional operations.

It should further be noted that "inland" states are no longer in the same position as they were in 1827. Railroads were the first means by which importers could also become distributors. The advent of air freight and highways has increased this flexibility to such an extent that Lawrenceville, Georgia and Johnson County, Kansas may be chosen by importers as distribution centers. There were no such things in 1827 and even with the advent of the railroad, not so many in 1871. Today, however, they abound. They are not the warehouses of 1827, and no Court has considered the impact of this change on *Brown v. Maryland, supra.*

POINT 9

THE TESTS PROPOSED BY THE PETITIONER DO NOT SERVE THE PURPOSES OF THE CONSTITUTION

The discussion below attempts to respond to Petitioner's points raised in their briefs. Since the points raised therein are not premised on the reasons behind the Import-Export Clause, limited responses to those points must fall short of achieving what the Framers and Justice Marshall desired. Limited counterproposals by these amici curiae can never cure the discrimination against United States residents and producers, and, like the Petitioner's proposed rule, will involve much further litigation in order to explain them. Nevertheless, the responses must be made, becaue they, at, least, approach the constitutional policies.

POINT 9a

THE PROPOSED ORIGINAL FORM "DOCTRINE" IS NOT SUPPORTED BY LOGIC OR BY BROWN v. MARYLAND

The Petitioner has postulated an original form "doctrine," asserting that Justice Marshall meant that individual articles which are not melted down or torn apart should not be taxable until sold. Of course, such a postulated doctrine has no support from *Brown v. Maryland* seen in its proper perspective. The examples set forth therein are consistent with an interruption of transit to allow the importer to dispose of or use the goods and/or a time when the goods will be taxed on a nondiscriminatory basis.

Assuming, however, that there is an original form "doctrine," that Justice Marshall meant to create such a thing, and that it was consistent with his examples in the opinion (all of which the Petitioner has not shown), there is still an inconsistency which such a doctrine creates. That inconsistency is that the ending of the goods' status as an import will never take place until the goods are used or sold. In effect, the Petitioner's proposal creates no rule at all.

Courts have said that two of the ways goods may lose their immunity are by use or by sale. A third is by withdrawal from their original package and a fourth is by changing the original form. The original form postulated by the petitioner is the substance of the individual imported article itself.

The only way that the substance will purposely be changed is through use by the importer or by another after sale. Either way, it will not be the change of form which will result in taxability but some other act (use or sale). So, in actuality, Justice Marshall may as well never have said "original form" in his opinion, if we take the Petitioner's view. The difficulty with this view is that the opinion does say that. The Courts which Petitioner accuses of ignoring its "original form doctrine" are actually utilizing it. Courts which use the Petitioner's concept to retain the immunity until sale or use actually ignore the concept.

It is proper to ask just what Justice Marshall meant by "original form." Petitioner assumes that he meant an individual article's shape. But the *Brown v. Maryland* decision does not speak in terms of goods which are going to be melted down; and a far more tenable position is that the original form had reference to the collective form of the goods as shipped. By breaking up the unit of transportation the importer has shown that he is using the goods, or preparing them for use. That is the same implication carried by the opening of the shipping container. The language ". . . original form or package. . . " indicates a parrallel approach. *C. F. May v. New Orleans, supra.* holds that the original package is the *shipping* package. It is logical that if any original form "doctrine" is to be announced, it should relate to the *shipping* form of the goods. and not their identity as individual articles. The original package concept does not call for a destruction of the identity of the goods before taxability. An original form concept should not either.

It should also be noted, as observed infra, that no policy of the Import-Export Clause calls for the establishment of such a "doctrine." In fact there is every reason to refuse to establish one.

POINT 9b

THE "FLOWING" OF THE GOODS DOES NOT SUPPORT THEIR IMMUNITY

The brief for the Petitioner asserts that there should be no taxability at a point where goods "flow in" and, subsequently, "flow out" to other parties after being sold. Exactly this same logic could be asserted by the peddler, which Justice Marshall claims should be taxed. In fact, that same logic could be used by an importer who broke open his cardboard boxes in order to sort them prepatory to selling them to customers in and out of the state. Many Courts, clinging to the original package doctrine, would find such a characterization by the importer to be irrelevant. Reliance should be placed upon whether the Import-Export Clause is supported by any policy which calls for taxation and whether failure to tax causes discrimination against United States citizens and domestic producers. all never intended by the Framers.

In fact, the "flow" of wholesale distribution, referred to by Petitioner in its brief at p. 14, leads to the conclusion that the importation process has ended. It is not pro-

per in light of Constitutional policy, to hold that an importation process does not end until a retail customer has brought the product or is ready to do so. In fact, *Youngstown Sheet & Tube Co. v. Bowers, supra,* holds that the import journey is complete when the goods are being used to supply the importer's needs.

In this same vein, it makes little difference whether the importer is a retailer or wholesaler. The auctioneer in *Brown v. Maryland, supra,* was just as capable of selling large lots of goods to retailers and jobbers as he was of selling goods to the public at large. If Justice Marshall had wanted to put the distinction on that basis, he would have.

POINT 9c

THE POSITION THAT THE GOODS MUST BE IN THE HANDS OF THEIR "ULTIMATE" USER BEFORE A NON-DISCRIMINATORY TAX MAY BE APPLIED IS NOT SUPPORTED BY ANY CASE

There is little doubt that two of the many reasons for the Court's decision in *Youngstown Sheet & Tube Co. v. Bowers, supra,* were 1.) an "end" of the import journey and 2.) the holding of the goods by their "ultimate" user.

The Petitioner asserts that it ". . . imports the tires for the sole purpose of selling them. . . " (Petitioner's Reply Brief, supra at p. 3). We have already stressed the fact that in *the context of the Constitutional policy*, there is little difference between sale as a use and manufacturing as a use (cf. Hart, *supra).* The goods are no longer being treated for the purpose of getting them into the country. They are being readied for their use in both cases. The fact that interstate transportation may follow the sale in both cases only increases the similarity of the two situations. The importing process has ended (cf. Prof. Melvin G. Dakin, *The Protective Cloak of the Export-Import Clause: Immunity for the Goods or Immunity for the Process"* [1958], 19 La. Law Review 747-776). Those things should be enough to support the idea that it is the Petitioner who is the ultimate user.

This is further supported by the fact that, although logically, the Petitioner could have done without a distribution center, he choose for his own economic reason to establish one here. The goods are taken off of the trucks and out of the cargo containers, which are meant to ship the goods to the point where transportation ceases and other functions begin. Then the goods are placed in the warehouse, segregated by size. That segregation does not facilitate transportation. In fact, it inhibits it. Before the goods can be further transported, an order must be received, and the goods must be taken out of the distribution center, some of each size. Then, they must be stacked so that they comprise a unit of trans-

portation to be trucked to the buyer. While doing all these things, the Petitioner takes advantage of the services of the locality, not to further ship the goods, but to prepare them for thier "sole purpose;" i.e., sale.

POINT 9d

THE SIZE OF SHIPMENTS OR SALES SHOULD NOT DETERMINE WHETHER THE IMPORT-EXPORT PROHIBITION SHOULD APPLY

The Petitioner asserts at p. 15 of its brief, that an "individual gossamer" package cannot or should not contain 11½ to 12½ tons of tires (at 20 pounds per tire, this is approximately 2200 tires). These amici suggest that whether a unit of shipment is small or large has little to do with the reasons for imposing a Constitutional prohibition on the states. The tests suggested by *E.J. Stanton & Sons v. County of Los Angeles* (1947) 78 Cal.App.2d 181, 177 P.2d 804 equate the original form with the original package. Much of the Court's rationale in that case is the same as used by this Court in *Youngstown Sheet & Tube Co. v. Bowers supra*, There is little doubt that both cases ignore the size of the lumber and ore shipments and attempt to reconcile precedent and the facts with the policies of the Constitution.

In this case, the Petitioner has broken down the unit of shipment, whether that be the overall shipment, or

an individual truckload, and has sorted the goods, preparing them for sale. Parts of some of those units were no doubt sold on the lien date. This is also true of the boxed goods which were stored side by side with domestically manufactured boxed goods. Whether they are in boxes or not, their relationship in the sales process of the importer/distributor is the same. The distribution center of today is a new entity (cf. *Ackerman, supra).* It would seem that neither *Brown v. Maryland* nor *Low v. Austin (supra)* had these changes in mind (cf. Dakin, *supra).*

POINT 9e

THE SEA VAN SHOULD PLAY A ROLE IN THE EVIDENTIARY DETERMINATION MADE PURSUANT TO BROWN v. MARYLAND

The Petitioner has made three arguments to the effect that sea vans should not be considered while determining whether the Import-Export prohibition should apply. 1.) Sea vans should not be considered the original package because they do not have the characteristics of the kinds of containers which are normally associated with packages. 2.) Sea vans cannot be original packages because they are vehicles or instruments of commerce. 3.) Holding that a sea van is an original package is not consistent with *Brown v. Maryland.*

1.) These amici are of the opinion that holding a container is not the original package because it is big (P.B. p. 18), or because it looks like a truck (P.B. p. 19) will be unhelpful in reaching a solution which is based on the policies of the Constitution.

2.) The argument raised by *Michigan State Tax Commission v. Garment Corporation of America* (1971) 32 Mich. App. 715, 189 NW2d 72, Cert. den. 404 U.S. 992, 30 L.Ed.2d 544, 92 S.Ct. 538, is to the effect that because the cargo container is an instrument of commerce, it cannot be the original package. The implication, of course, is that an article cannot have two names. Such logic, based on labels, does not strike these amici as being helpful.

In addition, that Court holds that changing circumstances cannot change the original package "doctrine." We have already seen that this is not what Justice Marshall said. If modern technology allows the sending of a complete unit of goods, in a protective case, directly from manufacturer to the domestic entity which buys them, without unloading, then it would seem that there is a significant change in the kind of evidence required to show that the importation process has ended and a domestic process has begun (cf. Dakin, *supra).*

It is the container of the unit of shipment which is the original pacakge (*C. F. May v. New Orleans, supra).*

Courts have not been reluctant to emphasize this. The term "original package" is applied to a bundle . . .

> "packed with some commodity with a view to its safety and convenient handling in transportation. . . . It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer." (*Cook v. Marshall County* [1903] 119 Iowa 384, 93 NW 372, aff'd 196 U.S. 261, 49 L.Ed. 471, 23 S.Ct.233.) (cf. *E. J. Stanton & Sons v. Los Angeles County, supra.)*

E. J. Stanton & Sons v. Los Angeles County, supra also looks toward changes in commerce as changing circumstances sufficient to alter rulings. As we have seen this is entirely consistent with Justice Marshall's evidentiary approach.

The California Supreme Court has accepted this approach. It has determined that cargo containers are evidence of the end of the import process (*Volkswagen Pacific, Inc. v. City of Los Angeles, supra).* The Petitioner's citation of *Michigan State Tax Commission v. Garment Corporation of America, supra,* stands for the proposition that there will never be evidence other than that recognized in 1871 which will effect the prohibition. These amici are of the opinion

that such logic is unhelpful and unrelated to the policies of the Constitution.

3.) We have already seen that *Brown v. Maryland, supra,* used the package as an example of the time when the importation process was complete, the domestic commerce had begun, and when it was likely that a license tax would fall upon imported and domestic goods alike. There is nothing inconsistent between that and an evidentiary approach to cargo containers which help the Petitioner.

If this Court uses the original form and package concepts as one of the pieces of evidence to show that the goods have come to rest and are at the disposal of the owner for his benefit, it should look to withdrawal of the goods from the cargo container. Other evidence of the end of the import process is the sorting of the goods for purposes of sale; the fact that the goods must again be resorted to be sent on in interstate commerce; the fact that the owner has the goods at his disposal. All of these things are true whether the goods are in cardboard boxes or not. The original pacakge concept was never meant to prohibit this logic.

POINT 10

CONCLUSION

Not allowing taxation until actually sold to the consumer who uses the goods is subject to exactly the same objection as it was in *Woodruff v. Parham.*

> "The merchant of Chicago who brings his goods in New York [in this case abroad] and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county and city taxes; for all that he is worth is invested in goods from New York [or abroad]. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchases his goods in New York [or abroad], is exempt from taxation. If his neighbor purchases in Boston [or under present law, New York], he must pay all the tax which Massachusetts levies with equal justice on the property of all its citizens."

The lack of any countervailing policy in support of a prohibition at this stage is evident. If another state's customers are to be forever protected from paying for the services rendered by the merchant's state, which help protect and transport the goods, then they should be equally protected in interstate commerce. All the usually cited language about the Im-

port-Export Clause, "attaching" its prohibition to the article, of course, cannot change this. In any case, such language requires more, since it attaches to the article only so long as it is an import, and it is an import only until it stops being an import under various tests, and those various tests must be related to some purpose of the Import-Export Clause.

We have set forth the reasons why the Courts of the 19th Century lost track of the purposes of the prohibition while clinging to mechanical tests during an era of change. Subsequent changes in commercial practices and in transportation, including sea vans, or cargo containers, modern highways, and air freight have allowed the importer/distributor even more flexibility and have allowed him to establish, not a warehouse, but a distribution center.

Whether this Court adopts the view that the import process has ended (see Dakin, *supra)* or that imposts and duties are not taxes (see Powell, *supra*), or that the prohibition ceases when the goods come to rest and are available to the owner (see *Minnesota v. Blasius, supra*) or that *Youngstown Sheet & Tube Co. v. Bowers, supra,* applies to this case (see Hart, *supra*), it will be doing so with a view toward the policies of the Constitution. The discrimination against the residents and United States manufacturers and distributors was never intended by the Framers or Justice by Marshall. That discrimination should be ended, and the ability of the states to levy uniform taxes should be restored.

There is no policy of the Constitution which prohibits ending these wrongs.

Respectfully submitted,
JOHN H. LARSON ,
Los Angeles County Counsel

JAMES DEXTER CLARK,
Deputy County Counsel

and Attorneys of Counsel

Attorneys for Amici Curiae

APPENDIX A

IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT

STATE OF CALIFORNIA

CRAIG CORP., et al.,	)	
	)	DECISION
vs.	)	PENDING
	)	2d Civ. No.
COUNTY OF LOS ANGELES, et al.	)	46268
	)	
	)	

DECLARATION OF
RONALD E. TIPPIE

1. Sea-Land Service, Inc. is a duly organized Delaware corporation, having its main offices in Elizabeth, New Jersey. Your Declarant is the Import Sales Manager for Sea-Land Service and is familiar with all the facts stated herein and if called upon as a witness could competently testify thereto.

2. Sea-Land Service, Inc. was the first fully containerized steamship company in the United States. The company began to transport cargo in containers, in vessels especially converted for such purpose, in 1956. Today there are a number of other steamship companies

that are fully containerized, however, a number of steamship companies operate both containerized and non-containerized vessels, or vessels that are mixed, i. e. part of the cargo is transported loose in the cargo hold while part of the cargo is carried in containers, either in the hold or on deck. The general term for non-containerized shipment is "breakbulk". "Breakbulk" refers to a general cargo ship containing goods which have been packaged in one manner or another, as distinguished from a bulk carrier, such as oil, grain, or ore. "Breakbulk" goods are packaged by the manufacturer or the exporter and delivered to the steamship company. They are loaded on the vessel at dockside and stored in the cargo hold in a loose fashion, placed together as tightly as possible until each cargo hold is full.

3. Containers may be referred to by a number of other names, including "cargo vans", "trailers", "cargo containers", "cargo boxes", and other similar designations. These containers are specifically designed to fit upon a chassis trailer, which is connected to a tractor or truck and thereafter moved upon the highway. Containers can also be moved by railroad or by barge. Any modern containership, such as those used by Sea-Land Service, is built with specifically designed holds. The hatch covers are larger than normal breakbulk vessels, and there are cell guides built into the holds. This allows the container to be lowered directly into its position in the hold where one container is stacked on another and held in place by the cell guides. Containers

are also stacked up to six deep on the deck of containerships and held in place by stacking frames.

4. Containers are metal enclosures, 8' x 8'6" x 20' or more in length. They are always 8' wide, which is the maximum allowable width on streets and highways. Most vans are 8'6" high. The length varies from 24 to 40 feet, depending on highway limitations, although most are now 35 or 40 feet in length. The chassis are especially built to carry a particular size or sizes of containers. Containers are placed on a chassis, are locked or clamped thereon by special devices, which must be unlocked or unfastened when the container is to be removed. Sea-Land Service owns or leases from an affiliate all its own containers and chassis. Other shipping companies generally own their containers, although in some instances they are owned by independent companies and leased to the shipping company. In no instances are the containers or chassis owned by either the importers or the exporters. Attached hereto and made a part hereof and marked Exhibit "A" are photographs of Sea-Land's newest 960 foot containership, the "Galloway", which can carry 1,085--35 and/or 40 foot containers, and typical containers of Sea-Land.

5. Containers are shipped Container Freight Station (CFS) to Container Freight Station or Container Yard (CY) to Container Yard, or a combination thereof. Goods shipped CFS to CFS are delivered by a foreign exporter to a CFS where the merchandise is loaded into

a container by the shipping company, or its agent. From the CFS the container is hauled on its chassis by a tractor to a point on the dock alongside the containership. At that point the container is lifted by a specially designed crane from its chassis and placed in the cell guides in the hold or on the deck of the containership. Upon arrival at the U.S. port the containers are removed from the containerships by specially designed cranes and placed on chassis spotted on the dock alongside the ship from where they are hauled by a tractor to a CFS, where the goods are unloaded from the container. The importer then arranges to have the unloaded goods clear Customs and delivered to his warehouse. Goods shipped CY to CY (or door-to-door) are loaded into the containers by the exporter in the foreign country, at his plant or warehouse, and the loaded container is delivered to a CY to await transfer to and loading onto a vessel by the same procedure as described above. After arrival in the United States, the container is unloaded from the ship, by the same procedure, and the container is delivered to the shipping company's CY. The importer or his agent then arranges to clear Customs and have the loaded container delivered to his warehouse or place of business. A CFS or a CY may be located immediately adjacent to the dock area or in a reasonable proximity thereto. One location may serve both purposes. Since the trucking of containers to or from the CY is not performed by the steamship company, the CY serves as a storage area where truckers bring containers to await loading on

a vessel or where containers removed from a vessel await pickup by a trucker.

6. Containers are loaded with merchandise consigned to one or more importers. In instances when containers are consigned to more than one importer, they are generally unloaded by the steamship company in a CFS. In most instances when the goods in the containers are consigned to only one importer, the container is delivered to a CY and goes to the importer's warehouse to be unloaded.

7. When the container is unloaded by the importer, or his agents, he is required to return the container itself within a given number of days, depending on the tariff rates of the particular conference line. For example, the conference line for shipments from the Far East, including Japan, Korea, and Hong Kong, provide that the containers are to be returned within 7 days after the container is unloaded from the ship. Thereafter, a demurrage charge is imposed of $10.00 per day for the first five days and $15.00 per day thereafter. The demurrage on a refrigerated container is $25.00 per day, after 5 days.

8. Upon arrival at its destination, the general procedure for a containership is to unload as quickly as possible, and the containers are placed on the dock or CY. Sea-Land owns or leases from an affiliate all chassis used by it, and upon discharge of the vessel each container is placed upon a chassis and delivered to the CFS unloading or to the CY for delivery to the

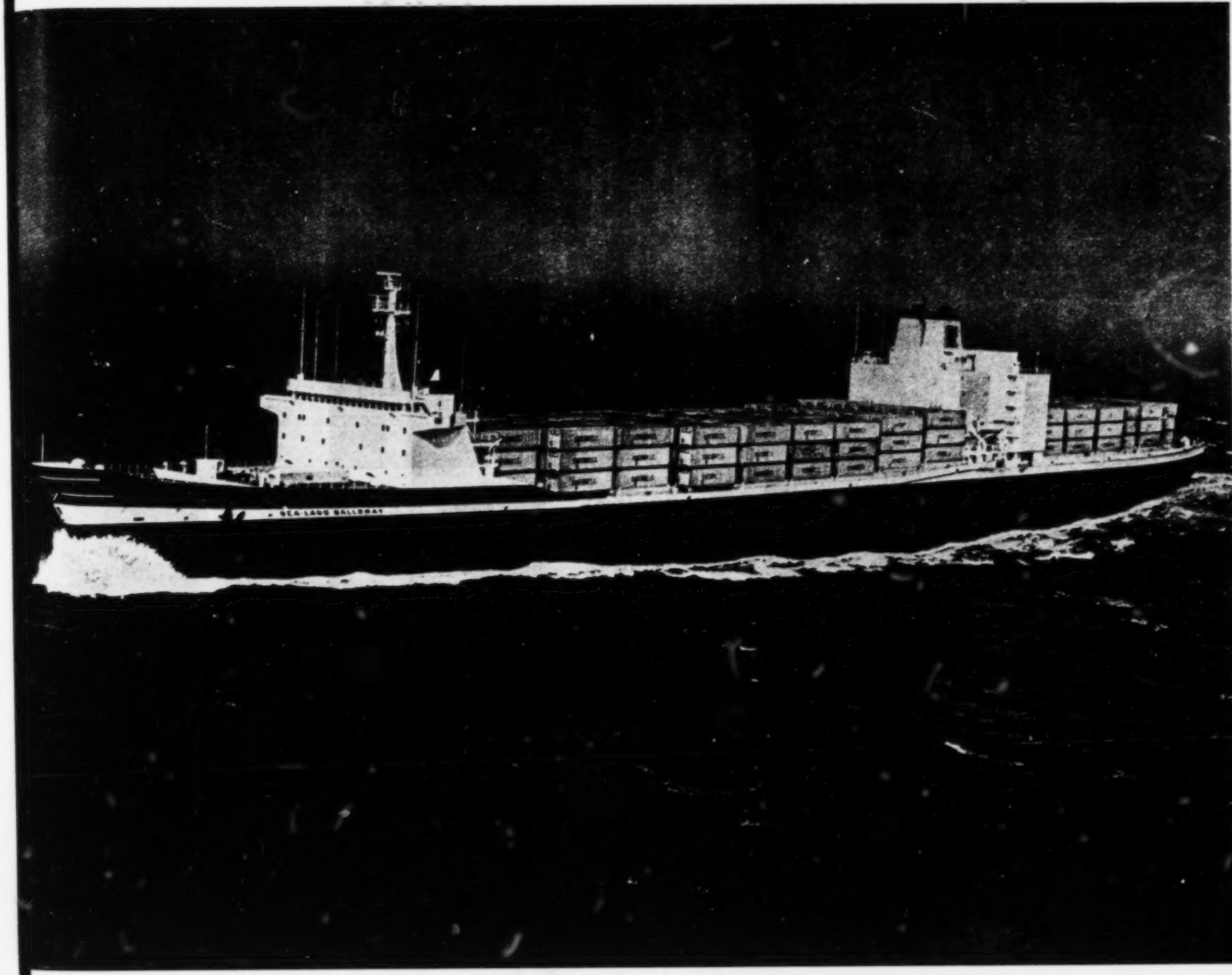
importer. The vessel itself is unloaded as quickly as possible. Unloading and loading of a containership usually takes less than twenty-four hours, and the same containers will not, under normal circumstances, be reloaded on that ship, but will be either delivered to the importer through the CY or unloaded at the dock.

9. The trend throughout the United States shows a vast increase in the use of containers for the shipment of all goods moving in international trade, which because of size, weight, and value can be placed and carried in containers. Attached hereto and made a part hereof and marked Exhibit "B" is a schedule from the Port of Long Beach showing the increases in general cargo shipment as compared to containerized shipment. Ten years ago container shipments through the Long Beach Harbor constituted less than 4% of the total general cargo tonnage, as compared to 1973 when shipment by containers represented almost 50% of the total general cargo tonnage. The expected trend in the future is for further dramatic increases.

I declare, under penalty of perjury, that the foregoing is true and correct.

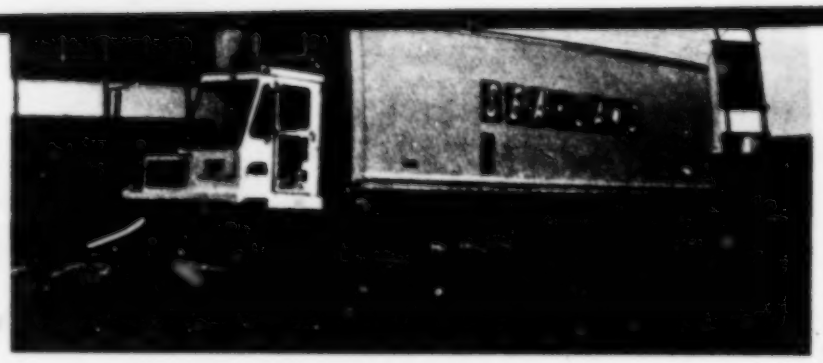
Dated: August 1, 1974, at Long Beach, California.

/s/ Ronald E. Tippie
Ronald E. Tippie


SEA LAND GALLORAT

DRY CARGO CONTAINER

	EXTERIOR LENGTH	EXTERIOR WIDTH	EXTERIOR HEIGHT	INTERIOR LENGTH	INTERIOR WIDTH	INTERIOR HEIGHT	DOOR OPENING WIDTH	DOOR OPENING HEIGHT	CUBIC CAPACITY
DRY CARGO (20')	35'0"	8'0"	8'6½"	34'7"	7'8½"	7'10⅝"	7'6"	7'8⅝"	2097 cu ft
	10.68 m	2.43 m	2.59 m	10.54 m	2.34 m	2.39 m	2.27 m	2.30 m	59.3 cu m
(A-40')	40'0"	8'0"	8'6½"	39'7"	7'8½"	7'10⅝"	7'6"	7'8⅝"	2401 cu ft
	12.19 m	2.43 m	2.59 m	12.06 m	2.34 m	2.39 m	2.27 m	2.31 m	68.0 cu m
(B-40')	40'0"	8'0"	9'6½"	39'7"	7'8½"	8'10⅝"	7'6"	8'8⅝"	2705 cu ft
	12.19 m	2.43 m	2.89 m	12.06 m	2.34 m	2.69 m	2.27 m	2.59 m	76.5 cu m



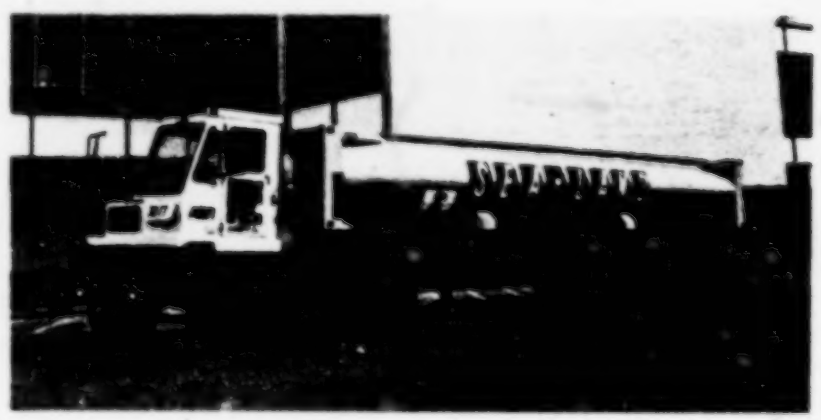
TEMPERATURE CONTROLLED A SERIES

EXTERIOR LENGTH	EXTERIOR WIDTH	EXTERIOR HEIGHT	INTERIOR LENGTH	INTERIOR WIDTH	INTERIOR HEIGHT	DOOR OPENING WIDTH	DOOR OPENING HEIGHT	CUBIC CAPACITY
35'0"	8'0"	8'6"	32'1⅛"	7'4⅛"	7'3"	7'3⅛"	7'1⅞"	1711 cu ft*
10.68 m	2.43 m	2.59 m	9.79 m	2.24 m	2.21 m	2.23 m	2.17 m	48.4 cu m

*Practical capability with air space min. is 1450 cu ft (40.8 cu m)

DRY CARGO, OPEN TOP CONTAINER

EXTERIOR LENGTH	EXTERIOR WIDTH	EXTERIOR HEIGHT	INTERIOR LENGTH	INTERIOR WIDTH	INTERIOR HEIGHT	DOOR OPENING WIDTH	DOOR OPENING HEIGHT	CUBIC CAPACITY
35'0"	8'0"	8'6"	34'7"	7'8"	7'4"	7'6"	7'6"	1970 cu ft
10.68 m	2.43 m	2.59 m	10.54 m	2.34 m	2.24 m	2.28 m	2.31 m	56.0 cu m



BULK LIQUID CONTAINER

EXTERIOR LENGTH	EXTERIOR WIDTH	EXTERIOR HEIGHT	CAPACITY
35'0"	8'0"	4'3"	Capacity (with outage) 5,250 U.S. gals.—Max. Load 5,000 U.S. gals.
10.66 m	2.43 m	1.30 m	Capacity (with outage) 21,680 Liters—Max. Load 22,728.8 Liters

IN EXACTING CIRCUMSTANCES THE INDIVIDUAL CONTAINER INVOLVED MUST BE MEASURED

BEST COPY AVAILABLE

THE PORT OF LONG BEACH

"America's most Modern Port"
P.O. Box 570 - Long Beach, California 90801 -
Telephone: (213) 437-0041 - (213) 775-3469 -
Telex: 65-6452 Portobeach Lgb

TOTAL GENERAL CARGO TONNAGE
VS
TOTAL CONTAINER TONNAGE

Period	Total General Cargo Tonnage	Total Container Tonnage
1962-63	2,386,188	88,905
1963-64	2,730,771	192,572
1964-65	2,788.655	197,122
1965-66	3,285,649	274,064
1966-67	3,993,683	299,658
1967-68	4,109,017	137,396
1968-69	4,356,886	186,764
1969-70	3,981,230	571,244
1970-71	4,603,033	1,191,053
1971-72	3,810.262	1,340,088
1972-73	6,395.847	3,054,361

Source:

Port of Long Beach General Plan 1973
Appendix V, Plate 26

/s/ Buddy Seidenberg
Buddy Seidenberg
1/2/74

EXHIBIT B

APPENDIX B

SUPERIOR COURT OF THE

STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALFRED HART COMPANY, et al.,	)	DECISION PENDING
Plaintiffs,	)	
vs.	)	No. C 83087
COUNTY OF LOS ANGELES, et al.,	)	STIPULATION OF FACTS
Defendants.	)	

The parties to this action, by their respective counsel, stipulate that the Court may find as facts in this action, at all times material hereto, without further proof, the following:

1. Plaintiffs NDC Distributors, Inc., formerly known as Alfred Hart Company, ("NDC"), Simon Levi Company, Ltd. ("Levi"). Southern Wine and Spirits of California, Inc. ("Southern"), Bohemian Distributing Company ("Bohemian"), Don W. Snyder Company ("Snyder"), and Western Liquor Distributors ("Western"), are, and at all times relevant

hereto were, corporations duly organized and existing under the laws of the State of California. Plaintiff Arizona Distributing Company ("Arizona") is, and at all times relevant hereto was, a corporation duly organized and existing under the laws of the State of Arizona and is and was a corporation engaged solely in interstate or foreign commerce. Plaintiffs Youngs Market Company ("Youngs") is, and at all times relevant hereto was, a corporation duly organized and existing under the laws of the State of Delaware and is and was duly qualified to transact business in the State of California. Plaintiff Foremost McKesson, Inc. ("Foremost") is, and at all times relevant hereto was, a corporation duly organized and existing under the laws of the State of Maryland and is and was duly qualified to transact business in the State of California.

2. Defendant County of Los Angeles, is, and at all times relevant hereto was, a policital subdivision of the State of California and defendants City of Los Angeles and City of Long Beach are, and at all times relevant hereto were, bodies politic and corporate and municipal corporations of the State of California.

3. On March 1, 1973, the tax lien date in question, plaintiffs were the owners of certain wines and spirits located in the County of Los Angeles that had been brought into said County from foreign countries and from Puerto Rico and which had a total full cash value of $14,975,411.

4. Taxes were assessed against such wines and spirits for the fiscal year 1973-1974 by defendant County of Los Angeles acting on behalf of defendants, and each of them, in an aggregate sum of $269,950.56 of which $39,966.13 was assessed on behalf of defendant City of Los Angeles and $419.52 was assessed on behalf of defendant City of Long Beach.

5. Plaintiffs have paid to the Tax Collector of defendant County of Los Angeles, acting on behalf of defendants, aggregate taxes in the amount of $269,950.56 on the dates, and in the respective amounts, set forth on Exhibit "A" attached hereto.

6. Plaintiffs Levi, Foremost, Southern, Bohemian, Snyder, Western and Arizona filed with the Los Angeles County Assessment Appeals Board, applications for equalization of 1973 assessment, which also constituted claims for refund, on the respective dates set forth on Exhibit "A" hereto, and NDC and Youngs also timely filed said applications, but no claims for refund, and paid such taxes under protest on the payment dates set forth on Exhibit "A". Said Board denied said application and claim for refund of plaintiff Arizona on October 16, 1973, and denied the remaining said applications and the respective claims for refund on December 11, 1973.

7. Thereafter, on Marcy 16, 1974, plaintiff NDC and Youngs instituted this action for recovery of ad valorem personal property

taxes in complaince with, and have otherwise met the requirements of the provisions of, Section 5138 of the California Revenue and Taxation Code. On that same date, the remaining plaintiffs instituted this action for recovery of taxes in compliance with, and have otherwise met the requirements of, the provision of Section 5103 of the Revenue and Taxation Code.

8. The taxes sought to be recovered herein are ad valorem property taxes, and plaintiffs contend that such taxes were either "Imposts" or "Duties" levied on "Imports" within the meaning of Article I, section 10, clause 2 of the United States Constitution. Defendants contend that such taxes were neither "Imposts"nor "Duties" within such constitutional provision.

9. At no time has the United States Congress "consented" within the meaning of the above-referenced constitutional provision to the assessment of any of the taxes sought to be recovered herein.

10. At no time were any of the taxes sought to be recovered herein "absolutely necessary" for the execution of "inspection laws" within the meaning of the above-referenced constitutional provision.

11. The wines and spirits against which the property tax was assessed and collected (the "Goods") were distilled or fermented in numerous foreign countries including Scotland,

France and Italy. The Goods also include spirits distilled in Puerto Rico. Attached as Exhibit "B" is a table showing the full cash value of the Goods distilled in Puerto Rico with respect to each of the plaintiffs.

12. Plaintiffs were the efficient and inducing cause for bringing the Goods into the United States and were the "importers" of the Goods. Defendants, however, do not stipulate that the portion of the Goods brought into this country from Puerto Rico are "imports" within the meaning of Article I, section 10, clause 2 of the United States Constitution. Defendants also do not stipulate that plaintiffs retained their status as "importers" of the Goods subsequent to the time the Goods were unloaded at plaintiffs' warehouses, as hereinafter described, or on March 1, 1973, the tax lien date in question.

13. Plaintiffs continuously made their own estimates of their future sales of particular brands and types of imported wines and spirits, and on this basis would place orders for the various Goods. Plaintiffs made all decisions as to the brand and amount of spirits and wines purchased. Plaintiffs placed purchase orders for the Goods with entities commonly known as exclusive United States sales agents for the foreign distillers and wineries. The United States sales agents then transmitted the purchase orders to the foreign seller where the orders were filled.

14. The foreign sellers placed the bottles comprising the Goods in rectanguler corrugated cardboard cartons or wooden cases, which typically contained twelve bottles in each carton or case. The bottles were separated with cardboard dividers and, in some instances primarily involving very costly wines, the cartons and cases were also packed with shock-insulating material such as exelsior to minimize any breakage of the bottles. The cartons and cases were then closed and sealed with either heavy sealing tape, glue, heavy staples or a combination of the above methods of closure. This packaging was in accordance with a long-standing commercial custom regarding this type of merchandise.

15. The exterior of the cartons and cases bear the imprinted name of the foreign seller and the name of the enclosed merchandise. The exterior of each carton and case was also marked with the direct import number of the plaintiff importer and/or other marks identifying the Goods to the purchase contract.

16. Following sealing of the cartons and cases, the cartons and cases were loaded into "cargo shipping containers," also known as sea vans, which were owned by the shipping companies. In some cases, loading took place at the distillery or winery. In other cases, loading took place at the shipping company's facilities which were usually located at or near the foreign port. Most cargo containers are eight feet high and eight feet wide and vary in length from twenty-four to forty feet. The

cargo containers were of two types. One type had provision for attaching a set of removable wheels, converting the containers into a truck trailer. The second type was designed to be attached to a wheeled chassis, again converting the container into a truck trailer. The second type could also be attached to special railroad flat cars for movement by rail. The cargo containers, with removable wheels attached or on a chassis, were then trucked to the dock for loading aboard ships. The wheels or the chassis were removed, the cargo containers lifted aboard the ships by large cranes, and stacked on the ships for transportation to the United States. In some cases, the cargo containers would be placed in the holds of ships specially designed to carry them.

17. All shipments were made to plaintiffs F.O.B. foreign port. Plaintiffs are indicated as the importer of record on United States Customs documents. Plaintiffs were responsible for procuring marine risk insurance on the Goods for the shipment and for paying ocean freight charges before the Goods were off-loaded in Los Angeles. Plaintiffs were not responsible for, nor did they obtain, any type of insurance with respect to the cargo containers. All shipping documents and documents of title to the Goods were delivered to plaintiffs, or their agents, prior to arrival of a shipment in the United States.

18. Upon arrival of a ship at the local port in the United States, plaintiffs' agents,

custom house brokers, would deliver the documents of title to the shipping company and complete the required United States customs forms. In almost all instances, the Goods were delivered "in bond," that is they remained under the exclusive control of United States Customs officials. The cargo containers were removed from the ships and wheels or chassis were attached to the cargo containers. The wheels or chassis were owned by independent common carriers. The common carriers were required to be bonded by the United States Customs Service, and could deliver the Goods only to a United States Customs Bonded Warehouse. The carriers would issue receipts for the Goods to both the Customs officials and plaintiffs' custom house brokers. The truck trailers then transported the Goods to United States Customs Bonded Warehouse ("Bonded Warehouses") located on plaintiffs' properties. When the Goods arrived, a United States Customs official was present and assumed exclusive supervision and control over the unloading of the Goods. The cartons and cases were removed from the cargo containers under his supervision, placed on pallets and then transported into the United States Customs Bonded Warehouse. During the unloading, the Customs official counted the cases and otherwise reviewed the quantities to confirm that the Goods delivered conformed to the description in the shipping documents. After the Goods had been placed in the Bonded Warehouse, the Customs official would lock the warehouse and retain the only key. After the Goods were unloaded, the common carrier

returned the cargo containers to the shipping company for use in future shipments.

19. A United States Customs Bonded Warehouse is under the exclusive custody and supervision of a United States Customs Bureau official. It may be either a separate building or it may be a caged area in a large warehouse. In either type, the Customs official retains exclusive control over all goods located in the warehouse, and maintains in his exclusive possession the only keys to the Bonded Warehouse. At NDC and Levi the bonded warehouses were located in buildings separate from plaintiffs' main warehouses. At Southern, Snyder, Foremost and Youngs, the Bonded Warehouses were located in caged areas in plaintiffs main warehouses. Bohemian and Western did not maintain Bonded Warehouses. All Goods placed in the Bonded Warehouses were exempt from payment of certain federal excise taxes and custom duties until withdrawn from the warehouses. Such goods are commonly referred to as being "in bond." The Goods were stacked by "bond lot" while in the Bonded Warehouse. Government regulations required that bond lots be kept separate from each other. The segregation of Goods by brand as each bond lot comprised only a single brand. Goods may be withdrawn from the bonded warehouse only under the supervision and control of the Customs official. Goods were withdrawn from the Bonded Warehouses as the need arose, as more particularly described in paragraph 22 below. The federal taxes and duties were paid as the Goods were withdrawn from the Bonded

Warehouse and placed in the main warehouse. The portion of the Goods held in United States Bonded Warehouses of plaintiffs on March 1, 1973 are set forth in Exhibit "B".

20. In all instances involving Bohemian and Western and, as to other plaintiffs in a few instances, primarily dealing with wines, plaintiffs' custom house brokers would pay the federal excise taxes and duties when the Goods arrived at the local port of entry. The cargo vans were unloaded in a like manner and delivered to a common carrier, which transported the Goods to plaintiffs' warehouses. These Goods were then unloaded and stacked by brand in the non-bonded portion of plaintiffs' warehouses. No United States Customs Bureau supervision was required.

21. The cartons and cases of wines and distilled spirits comprising the Goods could all feasibly have been shipped to the United States without the use of cargo containers. In some instances, plaintiffs imported wines and distilled spirits into the United States "break-bulk" under a procedure in which the cartons and cases were loaded individually onto ships in the foreign port through the use of pallets or slings and stored in the ships' holds. Plaintiffs were not responsible for, nor did they obtain, any type of insurance with respect to any pallets, slings or other equipment utilized in shipping break-bulk cartons and cases. These Goods upon arrival into the United States were unloaded in the same manner, delivered to the common carrier,

transported to plaintiffs' facilities and stored either "in bond" or in the non-bonded portion of plaintiffs' warehouses as described above. Pallets and slings may or may not be returned to the shipper for use in future shipments. Plaintiffs also on occasion imported wines and distilled spirits into the United States in shared cargo containers which also contained Goods being imported by other importers. Such imported Goods were also delivered to plaintiffs' warehouses and stored as described above.

22. Goods were withdrawn from the Bonded Warehouses from time to time to meet plaintiffs' inventory needs in the non-bonded portion of the warehouses. Upon removal from the Bonded Warehouse, the Goods were moved by fork lift truck to the main warehouses. Individual bond lots usually remained in the Bonded Warehouses for periods of from 1 to 12 months. Occasionally, low volume Goods would remain in the Bonded Warehouses for periods of up to 24 months. Once Goods were removed from the Bonded Warehouses and placed in the main warehouse, they and the non-bonded goods remained for periods of from 1 to 12 months prior to sale, with the usual period averaging approximately 3 to 4 months. In the main warehouse, the Goods were stacked in their original cartons and cases according to brand and bottle size, in those instances in which more than one size of a particular brand was in stock. The main warehouses contained both imported Goods withdrawn from the Bonded Warehouses and domestic wines and spirits which were also stacked in unopened

cartons and cases according to size and brand. There was no area of the warehouse devoted exclusively to domestic or imported merchandise, but the stacks of each brand, whether domestic or imported, were kept physically separate from each other. The cases and cartons were stacked so that the identifying case and carton markings were clearly visible.

23. The plaintiffs' main warehouses contained separate areas from which orders for less than full cartons or cases were filled. These areas were commonly termed "bottle rooms." These areas were not physically separate rooms, but were comprised of "speed racks," tilted metal frame racks with rollers allowing merchandise to move to the end of the rack by gravity power. The speed racks were filled with opened cartons and cases. The racks faced each other with a working area in the center. Usually, a special warehouseman was assigned to work in the bottle room only. Plaintiffs did not claim immunity from tax for any of the opened Goods in the bottle rooms.

24. Orders for full case or carton quantities were filled from plaintiffs' main warehouses. The various brands in unopened cases and cartons in each order were assembled on a shipping dock for loading on trucks. Plaintiffs usually delivered orders in trucks owned by or leased to plaintiffs. In isolated instances involving shippings over long distances, the orders were delivered by common carrier trucking companies.

25. Plaintiffs maintained computerized inventories of Goods in both the Bonded Warehouse and the main warehouses. As the Goods were sold and invoices issued, the information on the invoices was fed into the computer thereby providing plaintiffs with current inventory information. Physical inventories were made monthly and compared with the computer inventories.

26. Plaintiffs' customs consist of liquor stores, restaurants, grocery chains and other holders of retail wine and spirit licenses.

27. Plaintiffs maintained staffs of salesmen who called on customers at their business. Orders taken by the salesmen were then telephoned to the plaintiffs' warehouses for filing and shipment. Occasionally, customers would pick up merchandise themselves in sales referred to as "cash and carry."

28. All plaintiffs, with the exception of Arizona, sold to customers almost all of which were located in Southern California. With the exception of Arizona, plaintiffs made only isolated sales outside California.

29. Plaintiff Arizona made no sales to customers located in California. All Goods belonging to Arizona were taxed when in either a public Bonded Warehouse or a Bonded Warehouse owned and operated by Crescent Warehouse Company at the Port of Los Angeles. Arizona utilized Bonded Warehouse facilities in Los Angeles County because it did not operate

a Bonded Warehouse in Phoenix, Arizona, and no public Bonded Warehouse facilities were available. Goods were withdrawn by Arizona from the Bonded Warehouses in Los Angeles from time to time and shipped to Arizona by independent common carrier or Arizona's own truck to meet its inventory requirements. During the past year, a public warehouse operator in Arizona opened a U.S. Customs Bonded Warehouse and Arizona moved all Goods from Los Angeles Bonded Warehouses to such Bonded Warehouses. Arizona no longer utilizes any Los Angeles Bonded Warehouses for storage of any imported merchandise.

30. On March 1, 1973, plaintiffs, as desribed above, held (a) in their Bonded Warehouses, wines and distilled spirits in their original unbroken cartons and cases either imported by them into the United States through the use of cargo containers containing only plaintiffs' Goods or imported by them into the United States "Break-bulk" or in cargo containers shared with importers, and (b) in the non-bonded portion of their warehouses, wines and distilled spirits in their original unbroken cartons and cases either imported by them into the United States through the use of cargo containers containing only plaintiffs' Goods or imported by them into the United States "break-bulk" or in cargo containers shared with other importers. None of said imported wines and distilled spirits were, or ever had been, subject to any security interest or other lien held by a third party. The Los Angeles County Assessor assessed

the taxes, which are the subject of this action, against said wines and distilled spirits imported into the United States through the use of cargo containers containing only plaintiffs' Goods. The Assessor granted the immunity for said wines and distilled spirits imported into the United States "break-bulk" or in cargo containers shared with other importers.

31. On March 1, 1973, none of the Goods had been sold or otherwise transferred by any of the plaintiffs, except as hereinafter described. Western is the sole exclusive importer of Seagrams V.O. into Southern California. Bohemian owns all of the issued and outstanding capital stock of Western and Snyder. On March 1, 1973, Snyder and Bohemian held in their warehouses in the original unbroken cartons Seagrams V.O. having respective full cash values of $510,708.66 and $381,753.20, which had been transferred to them by Western. All such intercompany transfers were at a price equal to the net cost paid for such Goods by Western.

Dated: June 2, 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

-vs-

W. L. WAGES, TAX COMMISSIONER, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

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BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

INTEREST OF THE STATE OF GEORGIA

In the first case dealing with the Import-Export Clause of the United States Constitution, Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), Chief Justice Marshall recognized that the states have the right, inherent in sovereignty, to tax property within the state. The ad valorem tax levied against Michelin in this case was levied by Gwinnett County pursuant to the authority delegated to the County by the State of Georgia, and a portion of the revenues collected by the County represented a state levy which was required to be remitted by the County to the State of Georgia. See GA. CONST. art. VII, § 4, par. 1; Ga. Code §§ 92-3702, 5703, 5704 (1933), as amended. Because the Import-Export Clause is a limitation on the scope of the State's power to tax property within the State, it is in the interest of the State to insure that its power to tax is not unduly limited, and in the instant case the State of Georgia stands to lose specific revenues if the tax under consideration is not upheld.

STATEMENT OF THE CASE

The facts of this case have been set forth in accurate detail by the Supreme Court of Georgia in its opinion reported at 233 Ga. 712, 214 S.E.2d 349

(1975), and their amplification is not necessary in this amicus brief.

SUMMARY OF ARGUMENT

Prior to the time of taxation of Michelin's tires and tubes, Michelin had completed its activity as an importer and had begun its business activities as a wholesaler. The process of importation was completed, and the imported items ceased to be imports because whatever is held in this case to be the "original package", whether the sea vans or the bulk shipment itself, it was broken and the items became a part of the mass of taxable property located in Gwinnett County.

At the time of taxation Michelin was maintaining the tires, commingled with other imported tires, in the warehouse out of which it was conducting a wholesale business. Both Michelin and the tires at that point were enjoying the benefits and protections provided by Gwinnett County and the State of Georgia, and the use for which the items had been imported had begun. In such a case the Import-Export Clause was never intended to and does not prohibit a nondiscriminatory tax by the State to recoup Michelin's fair share of the costs of providing the services and protections enjoyed by Michelin and the imported items. On the facts of this case the balance between the State's inherent

power of taxation and the prohibition of the Import-Export Clause weighs out in favor of taxation.

ARGUMENT

A. TAXATION OF THE TIRES IN THIS CASE IS CONSISTENT WITH EACH OF THE TESTS WHICH HAS DEVELOPED UNDER THE IMPORT-EXPORT CLAUSE.

Since the landmark case of Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), the courts have repeatedly been faced with the problem in particular fact situations of balancing the Import-Export Clause 1/ prohibition against state and local taxation with the states' inherent and reserved 2/ powers of taxation and regulation. See generally The License Cases, 46 U.S. (5 How.) 504 (1847).3/

1/ U.S. CONST. art. I, § 10, cl. 2.

2/ See U.S. CONST. amend. X.

3/ Wherein Justice Daniel in his concurring opinion stated:

> "Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation . . . ." 46 U.S. (5 How.) at 613.

In attempting to resolve the practical problem of where to draw the line in a given case in the balancing of the state's power with the Clause's prohibition, the courts have developed several tests for determining when imported articles cease to be imports.

These tests are actually nothing more than paraphrases of the Import-Export Clause, embodied in workable principles which are capable of application to specific fact situations. The classic test of course is what has come to be known as the original package doctrine of Brown v. Maryland. However, that case actually set forth more than one principle applicable to the question of when an import ceases to be a nontaxable import, and these principles have been embellished, modified and extended by cases involving factual situations different from that before the Court in Brown v. Maryland. As will be hereinafter shown, under each of the primary tests which have been employed by the courts, the taxation in this case of Michelin's tires was proper.

In addition to these tests, and as an essential ingredient of each one, the purpose of the Import-Export Clause, along with the spirit of the provision, must be kept in mind. As will be discussed hereinafter, taxation of the tires in the instant case was not only proper under

the various tests and principles developed in the case law, but it is consistent with the spirit and purpose of the Clause. That this is true is most strongly evidenced by the fact that the time of taxation in this case came after Michelin had committed the tires to the purpose for which they were imported and had begun enjoying the benefits and protections provided by the taxing authority in the same manner as other wholesalers, after having broken the bulk of the shipments and having sorted and arranged the tires by size and style.

B. THE TIRES WERE COMMINGLED WITH THE COMMON MASS OF GOODS ALREADY IN THE COUNTRY AND WERE IRREVOCABLY COMMITTED TO THE USE FOR WHICH THEY WERE IMPORTED, SO THAT MICHELIN IS PROPERLY SUBJECT TO THE PROPERTY TAX IN THE SAME MANNER AS OTHER WHOLESALERS.

1. The immunity of imported goods from state and local taxation survives only as long as the goods are kept separate from the common mass of goods already in the country.

One of the principles enunciated by Chief Justice Marshall in Brown v. Maryland was that imported articles lose their immunity from taxation when they become "incorporated and mixed up with the mass of property in the country". 25 U.S. (12 Wheat.) at 441-42. This principle has been applied in various ways by this Court in later decisions. One of the cases most analogous to the instant one is May v. New Orleans, 178 U.S. 496 (1900).

In May v. New Orleans the question was whether a large container of individually wrapped or packaged items was the original package or whether each

individually wrapped item was its own original package. The importer argued that the individually wrapped items were immune from taxation as long as they remained in the form in which they were when placed in the larger case by the European manufacturer or packer. The Court rejected this argument almost out of hand, because such a construction would allow foreign manufacturers to compete with local dealers without any liability whatsoever to state or local governments, by doing no more than separately wrapping each item and then putting them all together in one box. In holding that the larger container was the original package, the Court found that the goods had been so acted upon by the importer that they ceased to be imports and became part of the mass of the property of the state subject to local taxation not only when the goods were placed in the hands of agents for sale, but also when the importer opened the outside box in which his separately wrapped parcels had been imported and then sold or offered to sell the separate parcels. Thus when the shipping case was opened for the sale or delivery of the separate parcels contained in it, each of the parcels lost its distinctive character as an import and became a part of the common mass of goods situated within the taxing jurisdiction,

> "the moment the boxes, cases or bales in which they were shipped reached their destination for use or trade and were opened and the separate packages therein exposed or offered for sale...." 178 U.S. at 510 (emphasis added).

In the instant case the tires were imported in bulk in sea vans.4/ (A. 31, 32) Whether, as will be discussed hereinafter, the sea vans, or the bulk of the shipment, is regarded as the original package, the tires became a part of the common mass of property in Gwinnett County, prior to taxation, because Michelin not only removed them from the sea vans, but sorted and separated them by size and style, and commingled them in its warehouse with other imported tires. (A. 34-35, 49, 50-52, 56-57) Under the test set forth in May v. New Orleans, at the moment of opening the van at the destination of the Michelin warehouse and exposing the individual tires for the purpose of trade, the tires became part of the taxable mass of property in Gwinnett County.

Petitioner's argument in the instant case that each tire is its own

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4/ See note 7, infra.

package is similar to the argument of the importer in May v. New Orleans that each individual parcel within the larger shipment was the package which remained free from taxation.5/ However, the rationale of Michelin's argument is just as fallacious as that of the importer

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5/ Michelin's additional argument on the fact of each tire being separately identifiable by virtue of a serial number has already been rejected by at least one court, Michelin Tire Corp. v. Board of County Comm'rs, cited in text at p.12, infra. But this argument is without merit anyway because probably most of the items imported today have identifying serial or code numbers whether they are shipped as individual items or in packages of a number of items. There is nothing in the record of this case to indicate that the serial numbers affected the import process in any way, e.g. bills of lading on specific tires. Compare E. J. Stanton & Sons v. Los Angeles County, 78 Cal. App. 2d 181, 177 P.2d 804, 808 (1947), cert. denied, 332 U.S. 766 (1947), rejecting a similar argument in regard to imported planks (see discussion of this case in text at 28, infra).

in May v. New Orleans, because if each tire does not become a part of the mass of the property of this country upon the breaking of the bulk (as did the smaller parcels in May v. New Orleans), then the tires would arguably never become subject to state and local taxation in the hands of an importer-distributor, even though other distributors were liable for the tax. See May v. New Orleans at 507-08. This subverts the purpose of the Import-Export Clause, which both Brown v. Maryland and May v. New Orleans recognized was to authorize immunity to imported goods only as long as they are kept separate from the mass of property already in the country.6/

The result demanded by May v. New Orleans is strengthened by the analogous cases involving imports for use in manufacturing as opposed to imports for resale. In particular, see Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 538 (1958), affirming the holding of the Supreme Court of Ohio that the protection of the Import-Export Clause does not extend to iron ore after it has

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6/ See Brown v. Maryland, 25 U.S. (12 Wheat.) at 443 ("the tax [may find] the article already incorporated with the mass of property by the act of the importer"); May v. New Orleans, 178 U.S. at 507.

been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place. Michelin's activities were similar in that the tires are commingled with other tires imported at a different time, and tires from the commingled mass of imports in the warehouse are removed for use in filling orders of retail dealers. (A. 56-57, 51) See also Michelin Tire Corp. v. Board of County Comm'rs, District Court of Johnson County, Kansas, Cases Nos. 54594, 56432, 58006, 59905, July 1, 1975, opinion reproduced in Appendix hereto.

2. The tires became taxable after their removal from the sea vans, sorting, and commingling in the warehouse, because there was an irrevocable commitment of the tires to the use for which they were imported, which was use in Michelin's wholesale business.

Another principle enunciated in Brown v. Maryland is that immunity ceases when the importer mixes the goods with the general property of the state by breaking up his packages and travelling with them as an itinerant peddler. In such an instance, the Court held, he

has used the privilege he purchased (by paying the federal import duty), and the state may treat the goods as it finds them. 25 U.S. (12 Wheat.) at 443. The Court has elaborated upon this principle in later cases dealing with imports for use in manufacturing.

In Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945), in which the question was whether hemp imported for use in manufacturing was taxable while in storage pending use, the Court held that an import has become a part of the mass of taxable property within a state when removed from the package in which it was imported or when used for the purpose for which it was imported. 324 U.S. at 665, 668.

Similarly, in Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959), the Court, after reviewing Brown v. Maryland and Hooven & Allison Co. v. Evatt, supra, held that imported iron ore became so mixed in with the mass of property already in the country as to lose its character as an import when it was irrevocably committed to the manufacturing process for which it was imported, by being stored with other similar imported goods pending use in the actual manufacturing process. Thus, this case added the additional principle that imported goods lose their immunity

from taxation at the moment they are irrevocably committed to the purpose for which they were imported.

Even though Hooven & Allison Co. v. Evatt and Youngstown Sheet & Tube Co. v. Bowers involve manufacturing use, rather than resale of the goods imported, the principles set forth in these cases are applicable to an import for resale case, because they are derived from the principles originally set forth in Brown v. Maryland. See Hooven & Allison Co. v. Evatt, 324 U.S. at 665; Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. at 543-45; Brown v. Maryland, 25 U.S. (12 Wheat.) at 443; May v. New Orleans, 178 U.S. at 508. In any event, the analogy is a good one when applied to the facts of the instant case.

The record shows that Michelin imports the tires and tubes through a broker. (A. 42-43, 50) The goods, which are packed and sealed at the factory in a sea van,7/ arrive at the Michelin warehouse some 7 to 8 days

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7/ A relatively small percentage of the tires from Canada are loaded into trailer-type containers. However, as a practical matter the principles discussed in this brief which apply to the sea vans also appear applicable to Michelin's use of the other shipping units. (see A. 32-33, 34, 43-44, 49, 52)

after arriving in this country.8/ (A. 45) At the warehouse the sea vans are opened, the tires are then sorted by size and style, loaded onto pallets, and the pallets are commingled with other tires imported from the same and at least one other country which are already in the warehouse. (A. 46, 56-57, 50) Not all tires from each country are stored in the Gwinnett County warehouse; some are stored in a different warehouse in another county. (A. 52) It thus becomes clear that at this point the tires are irrevocably committed for use in Michelin's wholesale business activities and the use for which they are imported is actually underway, because the tires are randomly stored with other imported tires for exposure to use and actual use in filling purchase orders in Michelin's wholesale business. As the orders are taken, they are filled at random from the tires in the warehouse, without regard to any shipment (A. 56-57, 51), and without regard to quantities of tires equivalent to the quantity imported on any particular sea van (A. 60). After an order is filled, the wholesale business proceeds either

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8/ The time lag may be somewhat different in some shipments from Canada. (A. 52-53)

through Michelin's shipping the tires to the retail dealer (A. 51), or by the dealers picking up the tires from the warehouse, in quantities as small as 4 tires (A. 51). Billing for the tires then follows delivery or pickup. (A. 51)

These activities of Michelin are almost identical to those of an importer in a case recently before the Supreme Court of California. In Volkswagen Pacific, Inc. v. City of Los Angeles, 101 Cal. Rptr. 869, 496 P.2d 1237 (1972), the taxpayer imported automobiles and automobile parts in sea vans, which were delivered to the taxpayer's warehouse; at the warehouse the items, some unpackaged, were removed from the sea vans and then distributed to local dealers. The court held that once the items, both packaged and unpackaged, were removed from the sea vans by the taxpayer with the intent and effect of acting as a wholesaler in the items, the items lost their immunity. 496 P.2d at 1243. See also American Mannex Corp. v. Cronvich, 251 La. 1014, 207 So.2d 778, 782 (1968).

Therefore, under the holdings of Hooven & Allison Co. v. Evatt, supra, and Youngstown Sheet & Tube Co. v. Bowers, supra, and May v. New Orleans, supra, Michelin's tires became a part of the mass of property already in the country and lost their character as imports at the time of the removal of the

tires from the sea vans, when they were sorted, stored, and commingled for use with other tires in Michelin's wholesale business activities. This is the use for which they were imported and at this time they became irrevocably committed to this use.9/ Under the holdings of these cases and Volkswagen Pacific, Inc. v. City of Los Angeles, supra, the tires became part of the general mass of property which Brown v. Maryland recognized is subject to taxation. See Brown v. Maryland, supra at 441, 443.

9/ The use in the wholesale business consisted of both availability to satisfy future purchase orders by dealers and the actual use of filling current and future orders by making sales to the dealers and either delivering the tires to the dealer or keeping the tires available at the warehouse for pickup by the dealer-purchaser.

C. BOTH THE ORIGINAL PACKAGE AND THE AGGREGATE OF THE BULK TIRE SHIPMENT WERE BROKEN SO AS TO RELIEVE THE TIRES OF THEIR IMMUNITY FROM TAXATION.

1. The sea van was the original package.

In enunciating the now famous original package doctrine in Brown v. Maryland, the Court stated that the prohibition of the Import-Export Clause continues in effect on property of the importer remaining in his warehouse "in the original form or package in which it was imported". 25 U.S. (12 Wheat.) at 442. In the instant case, the original package is the sea van in which the tires were stored, shipped and delivered.

In May v. New Orleans, supra, the Court held that:

> "[T]he 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import, and became property subject to taxation by the State as other like property situated within its

> limits." 178 U.S. at 508-09 (emphasis added).

Thus the original package is the container in which goods are shipped and delivered, which is the sea van in the instant case. The sea vans were packed with the tires and sealed at the foreign factory (A. 43), and they remained sealed, except for inspection by U.S. Customs Officials, from the time they were packed at the factory until unloaded at the Michelin warehouse. (A. 44)

Only a few cases have been found which have considered the precise question of whether or not a sea van is the original package for purposes of the Import-Export Clause, and the cases are split; but a finding that the sea van as used by Michelin in this case is the original package would be more consistent with May v. New Orleans than a holding to the contrary.

In Volkswagen Pacific, Inc. v. City of Los Angeles, 101 Cal. Rptr. 869, 496 P.2d 1237 (1972), discussed supra at p. 16, the court held that sea vans in which both packaged and unpackaged automobile parts were shipped were the original package. 496 P.2d at 1243. The facts showed that once the individual articles were removed from the sea van, Volkswagen distributed the articles to

local dealers, and the items became part of the mass of property in the country.

The contrary result was reached in Michigan State Tax Comm'n v. Garment Corp. of America, 32 Mich. App. 715, 189 N.W.2d 72 (1971). In that case the court held that the sea vans, which were used to ship industrial garments packed into heavy-duty cardboard cases sealed with heavy sealing tape and reinforced with heavy steel bands or straps, were not the original package, because the sea vans were found to be no different than over the road transportation vehicles. 189 N.W.2d at 74. However, that case is distinguishable from the instant case, because the garments had been adequately packed so as to be capable of shipment in the packages which were loaded in the sea vans. The tires in the instant case were not so packed. In addition, the manufacturer of the garments made the election to pack the garments in the reinforced cardboard cases, and it was the carrier hired to transport the packages who availed itself of the use of sea vans. In the instant case the sea vans are packed with the tires by the foreign factory and sealed at the factory as its intended shipping packages. Therefore, the garment corporation case is not contra to the Volkswagen case when applied to the facts of the instant case.

A third case, the most recent decision found on this question, falls between the holdings of the two foregoing cases and sets forth what is perhaps the best rule in cases involving sea vans. In Singer Co. v. County of Kings, 121 Cal. Rptr. 398, ____P.2d____ (Ct. App. 1975) the imported articles were various items of personal property which were packed at the factory in heavy-duty cardboard boxes with protective liners and packing and sealed with glue and heavy sealing tape or staples and then, upon occasion, transported by sea van. The court held that whether a sea van or cargo container constitutes an original package or not is a fact question to be answered under the circumstances of each case, 121 Cal. Rptr. at 404, and found on the facts of the case before it that the sea vans had not been employed as the original package. However, under this question of fact test, again it is clear in the instant case that the foreign manufacturer did intend to and did use the sea van containers as the original package for shipment. At no time were the tires removed from the sea vans and reloaded into other containers or vehicles from the time they left the factory until the time of delivery to Michelin's warehouse. (A. 43-44)

The ruling of the Singer Co. v. County of Kings case, supra, that whether or not a sea van container is the original package is a question of fact is

urged upon the Court as the proper view. At the time Brown v. Maryland was decided, and even as late as the first half of this century, sea vans and cargo containers such as the ones used in the instant case did not exist. Today these containers, which can be used in different ways, are revolutionizing the area of importing and exporting goods.10/ The actual manner in which these containers are used in a given case should be determinative, so that when the shipper or manufacturer employs the container to ship goods which are not capable of or are not otherwise packaged to be capable of safe overseas shipment, the container should be treated as the original package.

There is additional support for this position in a Second Circuit case involving a problem with sea vans and shipping containers which is analogous to the problem before this Court. In Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d 645 (2d Cir. 1973) the court was faced with the question of whether or not a sea van container was the shipping

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10/ See generally De Orchis, The Container and the Package Limitation-The Search for Predictability, 5 J. MAR. LAW & COMM. 251 (1973-74).

"package" for purposes of carrier liability limitation under 46 U.S.C. § 1304 (5)(1970).11/ After noting the new economic and transportation developments in the use of these containers, the court held that a container used to ship adding machines, which had been packed in light cardboard cartons only, and which prior to the advent of the container had been shipped in wooden cases or crates, was a "package" within the meaning of the federal statute. The court employed a factual test, looking at whether or not the individual units shipped were functional or usable for overseas shipment. The cardboard cartons were found not to be functionable, and thus the shipping container was found to be, in effect, a substitute for the wooden crates which had formerly been used in shipping the adding machines. 483 F.2d at 649.

In light of the development of the use of the sea van container in the

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11/ This section of The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300, et seq., provides, in part: "Neither the carrier nor the ship shall be...liable for any loss...exceeding $500 per package...."

modern import-export industry, the Court is urged to follow the rationale of May v. New Orleans, supra, and the other cases adopting a factual analysis approach to applying the original package doctrine today. The original package doctrine itself is merely a tool to aid the courts in determining when as a matter of law an article ceases to be an import,12/ and this determination necessarily requires scrutiny of the particular facts involved. In the instant case, the sea van is the original package, because it was at all times intended to be and was in fact used as a substitute for a packing crate, wrapper or other means of packaging the individual tires for the purpose of shipment and delivery from the manufacturer to Michelin's warehouse.

12/ See Baldwin v. Seelig, 294 U.S. 511 (1935).

2. Even if the sea van is not viewed as the original package, nevertheless, under the majority and better view the tires lost their immunity as imports when one or more of them were removed from the bulk shipment at Michelin's warehouse.

Just as in the cases involving sea vans, there is a split among the few cases which have considered the taxability of non-packaged imported items upon the breaking of the bulk of the shipment. The majority and better view is that where goods are shipped in the aggregate or in bulk without individual packaging, when one or more of the items are removed or separated from the bulk shipment, the goods become a part of the common mass of goods in the country and subject to taxation. This rule is applicable in the instant case, and the taxability of Michelin's tires is fortified even more by coupling this rule with the principles of Youngstown Sheet & Tube Co. v. Bowers, supra, and Hooven & Allison Co. v. Evatt, supra, discussed above, which authorize taxation when the imported items are used for or irrevocably committed to the purpose for which they were imported.

The essence of the cases comprising the better view is that the underlying

principle of Brown v. Maryland which retains validity in contemporary transactions and which will continue to be valid in the future, is that imported articles remain imports only so long as the original commercial unit of importation is not broken. Thus, when items are not shipped individually but as a part of an aggregate of other individual items, such as in the case of lumber, pipes, etc. the point in time at which the items cease to be imports is the time at which the bulk is broken by the importer. There is authority for this view not only in Brown v. Maryland but also in later cases decided by this Court.

In The License Cases, 46 U.S. (5 How.) 504 (1847) Justice Catron stated that:

> "[W]hen the article passes by sale from the hands of the importer into the hands of another, either for the purposes of resale or of consumption or is divided into smaller quantities, by breaking up the casks, packages, etc., by the importer, the article ceases to be a protected 'import,'...." 48 U.S. at 610 (emphasis added).

See also May v. New Orleans, 178 U.S. at 510.

The majority of the states which have considered this question follow this lead. In Columbus Steel Supply Co. v. Kosydar, 38 Ohio St.2d 258, 313 N.E.2d 389 (1974), it was held that the original package was the commercial unit of importation, or the aggregate shipment of steel pipe in that case. Thus when an individual pipe was separated from the commercial unit, or was sorted or segregated from other items comprising the commercial unit, the original package was broken. 313 N.E.2d at 393. See also Austin v. State, 101 Tenn. 563, 48 S.W. 305 (1898), aff'd, 179 U.S. 343 (1900) (an original package may be an "aggregation of goods, put up, in whatever form, covering or receptacle, for transportation, and as a unit transported from one state or nation to another"); Volkswagen Pacific, Inc. v. Los Angeles, supra.

In American Mannex Corp. v. Cronvich, 251 La. 1014, 207 So.2d 778 (1968), it was held that the original package comprised all individual steel oil well casings covered by the bill of lading for each shipment and that when the casings were sorted and stored with other tubing of like dimension and quality in the warehouse they were commingled with the common mass of goods. At that point in time they became irrevocably committed to the purpose for which they were ultimately

destined, sale by American Mannex, so that they lost their immunity and became taxable under the holdings of Youngstown Sheet & Tube Co. v. Bowers, supra, and May v. New Orleans. 207 So.2d at 782.

In the case of E. J. Stanton & Sons v. Los Angeles County, 78 Cal. App. 2d 181, 177 P.2d 804 (1947), involving the importation of lumber for sale at wholesale and retail, the court found that "the conclusion is irresistible" that the unit of importation is the original package. 177 P.2d at 807. The court stated that:

> "A cargo of planks, timbers or logs imported from foreign lands is surrounded by the invisible gossamer woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds its invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then...termination of immunity [is compelled]." 177 P.2d at 808.

The court relied upon, inter alia, May v. New Orleans and Brown v. Maryland in finding that the importer had used the privilege he had purchased and had himself mixed the articles with the common mass of property. 177 P.2d at 808-809. For a recent case adopting the majority view on facts actually involving Michelin Tire Corporation, see Michelin Tire Corp. v. Board of County Comm'rs, supra.13/

Even the cases which are ostensibly contrary to the majority view do not require a result in the instant case which would be different from that required by the majority view. In Florida Greenheart Corp. v. Gautier, 172 So.2d 589 (Fla. 1965), cert. denied, 382 U.S. 825 (1965), while the court held in effect that individual pieces of timber were their own original package, the court

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13/ The court held, on facts substantially identical to those of the instant case, that removal of the tires from the sea vans caused the aggregate to be broken and this, coupled with putting the tires to use in the wholesale business caused the tires to lose their identity as imports. See Appendix hereto.

stated that if the evidence had shown that the timber had been "promiscuously mixed" with domestic and other timber, then the timber would have been taxable.14/ 172 So.2d at 592. While in the case of Citroen Cars Corp. v. City of New York, 30 N.Y.2d 300, 283 N.E.2d 758 (1972), the court ruled that certain cars imported for sale at wholesale were immune from taxation, the issues of aggregate shipment and commingling of imported items were not raised and the decision turned on a principle favorable to Respondent in the instant case.15/ In the case of Wilson v. County of Wake, 19 N.C. App.

14/ On the facts it could not be determined how many of the timbers were generally commingled with other shipments for sale to the public and how many were segregated according to existing orders. A strong dissent by two justices thought May v. New Orleans and other authorities required a result contrary to the majority's ruling based on a prior state decision. 172 So.2d at 592-95.

15/ The court adopted the test of Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959) that immunity is lost when the import has been so acted upon as to lose its immunity and found on the facts that immunity was not lost where only temporary, minor changes in the cars had been made to accomplish delivery and to complete the physical integrity of the product. See 283 N.E.2d 762, 759, 761.

536, 199 S.E.2d 665 (1973) the court of appeals expressly rejected the aggregate shipment concept on the facts before it, but the argument was based upon the hold of the ship constituting the original package, not, as in the instant case, on a sea van packed by the manufacturer and both intended to be and actually used as a substitute for a shipping crate.

Therefore, it can be seen that even the cases which seem to reject the view that an aggregate shipment is an original package, are not in conflict with a ruling on the facts of the instant case that the imported tires lost their immunity from taxation before the tax assessment was made. None of Michelin's tires are individually packaged, nor are they packaged in crates or boxes inside the shipping container. They are shipped as a bulk shipment of tires, collectively "packaged" in a containerized sea van. (A. 31) There is absolute continuity from the time of packing at the foreign manufacturer's plant until the time of delivery and breaking of the container at Michelin's warehouse, at which time the tires are sorted and segregated by size and style and commingled with the mass of goods already in the warehouse. (A. 43-44)

Thus it is clear, particularly under the majority and better view which follows the underlying rationale of Brown v.

Maryland, that tax immunity is lost at the time of sorting, segregating and commingling the tires which are removed from the sea van at Michelin's warehouse. As pointed out in American Mannex Corp. v. Cronvich, supra, it becomes all the more clear that the tires lost their immunity upon the breaking of the aggregate shipment, because when the tires were sorted and stored in the warehouse the use for which the importation was made began and the tires were irrevocably committed to exposure and availability for and actual use in Michelin's wholesale business conducted out of its warehouse. See also Hooven & Allison Co. v. Evatt, supra, and Youngstown Sheet & Tube Co. v. Bowers, supra.

Therefore, even if the sea van is not viewed as the original package, the majority and better view among the state cases and the decisions of this Court require the conclusion that the breaking of the aggregate shipment, coupled with Michelin's subsequent use of the tires, terminated the tires' tax immunity.

D. MICHELIN HAS AVAILED ITSELF OF THE BENEFITS AND PROTECTIONS OF THE STATE OF GEORGIA AND GWINNETT COUNTY.

Another principle or test which has emerged in the case law is to determine at what point, after the state has obtained jurisdiction over the article, the importer has begun to avail itself of the benefits and protections provided by the state in such a manner that it is both fair and necessary for the state to exact a return from the importer for services provided. This test balances both the purposes behind the Import-Export Clause and the needs of the states to secure revenues from persons to whom it provides benefits and protections.

The essence of this test was set forth in The License Cases, supra, wherein Justice Daniel in his concurring opinion stated:

> "All property of the citizen, who is himself protected in his person and in the enjoyment of his property, is bound to contribute to the support of the government which yields this protection, whether he shall have imported that property, or purchased it at home." 46 U.S.(5 How.) at 613.

Justice Daniel went on to point out that the power of the federal government to regulate imports and exports must be "expounded in coincidence with a perfect

right in the states to all that they have not delegated;[16/] in coincidence, too, with the possession of every power and right necessary for their existence and preservation. . . ." 43 U.S. (5 How.) at 614. See also the majority opinion written by Chief Justice Taney, 46 U.S. (5 How.) at 576.[17/] Therefore, from the earliest cases seeking to strike the proper balance between granting the tax immunity to imports and allowing the states to exercise their inherent and reserved taxing authority to the fullest extent permissible, this Court has recognized that taxation is justified when the property or the citizen begins to enjoy the benefits and protections of the state government in a capacity other than as an importer.

This principle was also touched upon in May v. New Orleans, supra, wherein the Court stated that imported items lose their immunity at the time the importer has so acted upon them that they have become incorporated or mixed with the general mass of property in the state because:

16/ See U.S.CONST. amend X.

17/ "[A] State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any property of which he is the owner."

> "[T]hey are property within the State in like condition with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate." 178 U.S. at 507-08.

Thus, in the instant case, where Michelin has acted upon the tires through the breaking of the shipment, the sorting and segregating of the tires, the commingling of them with other imports, and the maintaining and employing of them in that phase of its activities which constitutes a wholesale business, Michelin has so acted upon the tires as to avail itself and the tires of the benefits and protections afforded them by the State of Georgia and its governmental subdivision, Gwinnett County.

Among the benefits and protections provided are fire protection, police protection from theft, etc., utilities, roads and highways and other services essential to the conduct of Michelin's business as a wholesale dealer in the tires which have come to rest at its warehouse. The ad valorem property tax, levied at the point in time where Michelin has committed the tires to use and used the tires in its wholesale operation is a justifiable quid pro quo

for these benefits and protections.[18/] These tires which are exposed for sale (A. 51), constitute a portion of the mass of the wealth of the state as much as do similarly situated domestically produced goods. To decide otherwise would require the domestic producer to pay for governmental services and police protection provided to the importer-wholesaler. Such a result is inconsistent with the purposes of the Import-Export Clause, which was meant to prevent discrimination against imported goods, not to authorize discrimination against domestic producers.

18/ See generally Dakin, The Protective Cloak of the Export-Import Clause: Immunity for the Goods or Immunity for the Process?, 19 LA. L. REV. 747, 753 (1959), citing an unreported state case decided in 1870; Note, State Taxation of Imports --- When Does an Import Cease To Be an Import?, 58 HAR. L. REV. 858, 867 (1945).

E. TAXATION OF THE TIRES IN THIS CASE IS CONSISTENT WITH THE PURPOSES BEHIND THE IMPORT-EXPORT CLAUSE.

As shown in the preceding sections of this brief, the tax imposed on Michelin's tires by Gwinnett County and the State of Georgia satisfies each of the various principles and tests set forth by the courts for determining when such a tax is proper. However, it is helpful also to draw back from the principles and paraphrases and to view the intent, purpose and effect of the Import-Export Clause itself as applied to the factual situation currently before the Court. When this is done, it becomes apparent that the tax imposed upon Michelin at the point in time that it was levied is fully consistent with the Import-Export Clause.

In Brown v. Maryland, the Court concluded that the Import-Export Clause prohibits not just duties on the act of importation, but also duties on the thing imported. Nevertheless, it seems clear that the farther the prohibition is extended beyond the act of importation the more suspect the prohibition becomes. That is, once the act of importation is completed, unless a property tax on the goods imported can be shown to violate some significant purpose behind the Import-Export Clause, such a tax, if otherwise fair and nondiscriminatory, should be upheld.

In The License Cases, supra, Justice Daniel stated in his concurring opinion:

> "So soon as [the goods] are cleared of all control of the government which permits their introduction, and have become the complete and exclusive property of the citizen or resident, they are no longer imports in a political, or fiscal, or common sense. They are like all other property of the citizen, and should be equally the subjects of domestic regulation and taxation, whether owned by an importer or his vendee. . . ." 46 U.S. (5 How.) at 614.

In the instant case, Michelin's tires had passed beyond the control of the federal government which permitted their introduction into the country and had become the complete and exclusive property of Michelin Tire Corporation of Georgia before the time of taxation. (A. 41, 44).

Though the tires were intended for subsequent sale and shipment to or pick up by retail dealers, they were no longer in transit during the period they were stored in the Gwinnett County warehouse. The record on the whole shows that they were stored in the warehouse to be used in filling orders from retail dealers. (See A. 35, 51). None of the shipments were earmarked or

designated for delivery to a particular dealer or to fill a particular order. (A. 28-57, 60). Thus, it was impossible to tell whether any given tire or shipment of tires was used or will ever be used in filling orders, even though they are irrevocably committed to and exposed to such use. In fact, domestic items may be, and have been on occasion, substituted for Michelin's foreign-made products in order to satisfy orders by dealers. (A. 29, 30) Therefore, it cannot logically be said that the import shipments were still in transit to another place in the country after sorting, segregation and commingling with the other tires at the Gwinnett County warehouse.

There is nothing in the record to show that any one tire or shipment of tires could not sit in the warehouse for years before it was used, if at all, to fill an order, because the orders and the tires selected to fill the orders in no way corresponded to shipping van quantities. (See A. 57, 60)

In addition, the evidence indicates that it was a broker who actually imported the tires and brought them into the country for Michelin Tire Corporation. (A. 42-43, 50) This makes it even clearer that Michelin, once it received the tires and sorted them and commingled them in its warehouse with other imports, began engaging in its business as a wholesaler and began enjoying the benefits and protections of Gwinnett County and the State of Georgia in that capacity.

While not directly in point, a recent decision of this Court concerning exports further indicates that in a factual situation similar to the instant one the Import-Export Clause was not intended to prohibit ad valorem taxation. In the case of Kosydar v. National Cash Register Co., 417 U.S. 62 (1974), the Court held that an ad valorem tax on cash registers manufactured in this country and crated and shipped to a warehouse in Ohio to await foreign shipment was proper even though none of the cash registers ever under any circumstances went into the United States domestic market. The facts of that case on exports depict the exact reverse side of the import question involved in the instant case: When the adding machines were assessed they were sitting in NCR's[19/] warehouse awaiting foreign shipment (just as Michelin's tires when assessed were sitting in its warehouse awaiting shipment to or pick up by retail dealers); title and possession were still in NCR (as in the instant case they were in Michelin); no payment had yet been made by the putative purchasers (as none had been by the putative dealers in the instant case); the machines were in the complete control of NCR (as the tires were and are in the complete control of Michelin); there had been no movement of the goods yet in the direction of foreign commerce (as there had been no movement of the tires in this case in the direction of any dealers); and

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19/ National Cash Register Company.

there had been no commencement of the process or procedures of exportation (as there had been no commencement of the process of selling specifically designated tires, i.e., no purchase orders were taken nor bills of lading, etc. prepared nor shipping contracts with carriers entered into to deliver the tires to a dealer). The Court's statement of the purpose of the Import-Export Clause, though made in regard to exports, is also applicable to imports:

> "The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services." 417 U.S. at 70 (emphasis added).

Thus, the Court held that the mere prospect of export, no matter how certain, does not start the process of exportation.

Similarly, Michelin's prospect of selling each of the tires of each of the shipments imported into this country and of shipping them to dealers, no matter how certain, does not start the process of making such sales nor prolong the process of importation. At the point in time at which the tires were taxed it cannot be said that they were still being imported.

Therefore, on the facts of this case the taxation of Michelin's tires is consistent with the intent, purpose and effect of the Import-Export Clause.

F. TAXATION OF THE TUBES WAS ALSO PROPER IN THIS CASE.

The principles applicable to the tires, as discussed above, are applicable to Michelin's tubes also, even though the tubes were placed in individual boxes inside larger cartons.

The breaking of the sea van and the bulk of the aggregate shipment is what constituted the breaking of the original package. (A. 47, 43-44) See authorities cited in argument C, supra. And, more importantly, Michelin treated the tubes in a manner consistent with its wholesale business, not its business as an importer. The purpose of the importation of the tubes was for use in its wholesale business. Upon the removal of the tubes from the sea vans and storage in the warehouse, even though they remained in smaller boxes, they became irrevocably committed to this use. Michelin enjoyed the benefits and protections of state and local laws just as fully in regard to the tubes as it did in regard to the tires, and, therefore, should be required to reimburse the State for the costs of providing these protections and services.

Even though individual tubes were removed from the full cartons area of the warehouse once their larger carton was broken (A. 35), nevertheless, the

remainder of the tubes had already been commingled with other imported tubes (A. 50, 57). The process of importation had been completed and the tubes were being treated and used in the same manner as domestically produced items stored for use in filling orders in a wholesale business. See Volkswagen Pacific, Inc. v. City of Los Angeles, 101 Cal. Rptr. 869, 496 P.2d 1237, 1243 (1972). See also May v. New Orleans, supra. Therefore, all of the imported tubes were properly subject to taxation in this case.

G. PETITIONER'S ARGUMENTS ARE WITHOUT MERIT.

Michelin's argument that the "original form" doctrine prohibits taxation of its tires because the form of the tires is not changed between the time of delivery of the tires to the warehouse and the time of withdrawing the tires from the warehouse for the filling of purchase orders by dealers is without merit, because the term "original form" as used in Brown v. Maryland in the phrase "original form or package" was not intended to encompass changes in the physical state of the ultimate product, but rather was intended to refer to the shipping state of the imported item. Thus the term "original form" is properly applicable apart from the term "original package" only when used in reference to items incapable of packaging or capable of physical processing, such as ores, oil, etc.20/

The phrase "original form" has no applicability to automobile tires, which are capable of either being wrapped or packaged or shipped in bulk but which in no instance are capable of being physically modified when the purpose of importation is for resale. While the principles set forth in the cases discussed above involving

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20/ See generally Dakin, supra note 18, at 769, and citations therein.

imports for manufacturing are generally applicable to the instant case, nevertheless, to strain the "original form" principle to include automobile tires imported for sale violates not only the Court's intent in Brown v. Maryland but the subsequent application of the term in other decisions.

Michelin's argument that the imported tires are "still in the flow of import distribution" while in Michelin's warehouse is also without merit. In making this argument, Michelin relies upon Youngstown Sheet & Tube Co. v. Bowers, supra, and, inter alia, the Court's statement therein that the imported ores in that case were merely "in transitu". 358 U.S. at 540, n. 6. However, the facts of this case are to the contrary, as discussed in argument E of this brief. The tires came to rest at the warehouse, and could be stored at the warehouse in their commingled condition indefinitely before ever being shipped, if at all, to a dealer who placed an order for tires of a particular size and style. The record is silent on what would happen to tires in the warehouse if there were a model change or a style change; tires of this type might never be sold and shipped to any dealer.

Reliance by Michelin upon the case of Standard-Triumph Motor Company, Inc.

v. City of Houston, 220 F.Supp. 732 (S.D. Tex. 1963), vacated, 347 F.2d 194 (5th Cir. 1965), cert. denied, 382 U.S. 974 (1966) is misplaced, because that case dealt with a temporary change in form of imported automobiles in order to accomplish delivery of the cars to the importer's warehouse. 220 F.Supp at 733.

Also, Petitioner's argument that the Import-Export Clause prevents the states from adding a tax to items imported so as to raise the price on the goods once they reach inland states was put to rest as long ago as The License Cases, 46 (5 How.) U.S. 504 (1847), wherein the Court stated in the majority opinion that it was not improper for the laws of a state to, by their effect, "discourage imports, and diminish the price [they] would otherwise bring." 46 U.S. (5 How.) at 577.21/ In addition, this argument is without merit because the rationale behind it would also apply to import duties imposed by the federal government, which are authorized by the Import-Export

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21/ See also the concurring opinion of Justice Woodbury, stating that a state law is not unconstitutional merely because it tends to diminish the consumption of foreign articles, 46 U.S. (5 How.) at 621-22; Note, supra note 18 , at 867.

Clause in order to protect domestic brands from competition by foreign manufacturers.

Therefore, none of Petitioner's arguments are sufficient to rebut the decision by the Georgia Supreme Court that Michelin's tires had lost their immunity from taxation.

CONCLUSION

The long history of cases has established that an importer who is also engaged in selling his imports is conducting two distinct operations. As long as he is acting with or upon the articles as imports, both he and the articles are exempt from taxation. However, as soon as he begins acting with or upon the articles in his other business capacity, the articles become subject to taxation. This is the essence of the ruling of the Georgia Supreme Court in this case, and it is not only consistent with all of the principles expounded in the area by the many cases since Brown v. Maryland, but it fully comports with the spirit and effect of the Import-Export Clause. In this case Michelin was taxed only after it had exposed the imported items to use and had begun using the imported items in its wholesale business, in which it enjoyed the benefits and protections of the State of Georgia and Gwinnett County just as fully as any other wholesaler in the County. Therefore, both the spirit of the Constitution and the facts of this case require that the decision of the Georgia Supreme Court be affirmed as to the tires and modified as to the tubes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Herman Perry Michael, one of the attorneys for the State of Georgia and a member of the bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Brief For the State of Georgia As Amicus Curiae upon all parties required to be served by mailing copies thereof, first class postage prepaid, to the attorneys of record for Petitioner and Respondents.

This 5th day of September, 1975.

HERMAN PERRY MICHAEL
Senior Assistant
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APPENDIX

APPENDIX

[Filed in Clerk's Office July 1, 1975.
Hazel J. Mueller, Clerk of the District Court.]

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS

MICHELIN TIRE CORP., *Plaintiff*, vs. BOARD OF COUNTY COMMISSIONERS OF JOHNSON COUNTY, KANSAS, et al., *Defendants.*	CASE NO. 54594 56432 58006 59905 DIVISION NO. IV

MEMORANDUM DECISION

Findings of Fact

1. The plaintiff, Michelin Tire Corporation, is incorporated under the laws of the State of New York and maintains its principal office in Lake Success, New York. Plaintiff at all pertinent times was qualified to do business in Kansas as well as various other states of the United States.

2. The defendants are the governing bodies of all tax units affected by plaintiff's protest of payment of ad valorem taxes and all other governmental units or officers who have any interest in these actions.

3. The Michelin Tire Corporation is plaintiff in:

(a) Case No. 54594 in which, with reference to its assessment on tangible personal property in the total sum of $95,555.00 for the year 1972, admitting the legality of an assessed valuation in the sum of $5,565.00 but contending the remainder of the said

total valuation in the sum of $90,990.00 to be illegal and void, plaintiff sues for the refund of taxes paid under protest in the amount of $9,609.63.

(b) Case No. 56432 in which, with reference to its assessment on tangible personal property in the total sum of $94,465.00 for the year 1973, admitting the legality of an assessed valuation in the sum of $5,000.00 but contending the remainder of the said total valuation in the sum of $89,465.00 to be illegal and void, plaintiff sues for the refund of taxes paid under protest in the sum of $4,28[illegible].94 for the first half of the 1973 taxes.

(c) Case No. 58006 in which, with reference to its assessment on tangible personal property in the total sum of $94,465.00 for the year 1973, admitting the legality of an assessed valuation in the sum of $5,000.00 but contending [1] the remainder of the said total valuation in the sum of $89,465.00 to be illegal and void, plaintiff sues for the refund of taxes paid under protest in the sum of $4,286.94 for the second half of the 1973 taxes.

(d) Case No. 59905 in which, with reference to its assessment on tangible personal property in the total sum of $57,335.00 for the year 1974, admitting the legality of an assessed valuation in the sum of $4,505.00 but contending the remainder of the said total valuation in the sum of $52,830.00 to be illegal and void, plaintiff sues for the refund of taxes paid under protest in the sum of $2,762.56 for the first half of the 1974 taxes.

These actions involve common questions of law and fact and have been consolidated for trial by court order.

K.S.A. 79-201 provides that all personal property in this state, not expressly exempt therefrom, shall be subject to taxation and K.S.A. 79-1439 provides that all tangible personal property subject to general property taxes shall be assessed at 30% of its value.

4. With reference to the tax years involved in Cases numbered 54594, 56432 and 58006, the administrative determination of the County Assessor is that plaintiff's inventory is and was subject to the provisions of K.S.A. 79-1001 et seq., and that had plaintiff correctly reported its personal property inventory in accordance with K.S.A. 79-1001 (c) (b), said defendant would have accepted said renditions. In connection therewith, in the year 1972, 72.5% of the value of plaintiff's inventory in Johnson County, Kansas, was shipped to destinations outside of the State of Kansas, and in 1973, 75.2% of the value of plaintiff's inventory in Johnson County, Kansas, was shipped to destinations outside of the State of Kansas.

Plaintiff's rendition for the 1974 taxes was made in accordance with K.S.A. 79-1001 (c) (b).

5. The nature and character of the business in which plaintiff engages in the State of Kansas is leasing a warehouse for the purpose of maintaining a stock of tires and selling its tires within the said state and generally carrying out its corporate purposes within said state. The nature and kind of business in [2] which plaintiff is engaged in Kansas is that of distributing tires. It is a wholesale and to some extent a retail business. There are between thirty and fifty authorized dealers in the State of Kansas from time to time receiving goods.

6. Plaintiff enters into written dealer-sales agreements with various individuals, partnerships, limited partnerships and corporations whereby the latter become dealers in Michelin products.

(a) Plaintiff agrees to sell to the dealers and the dealers agree to purchase from plaintiff Michelin products offered for sale by plaintiff.

(b) The dealers are required to promote the retail sale of Michelin products and to render service with respect to Michelin products. They must establish and maintain a place of business satisfactory to plaintiff in appearance, size, layout and equipment. They must permit plaintiff to have access to their premises during all business hours. Dealers are required by plaintiff to prominently display Michelin signs and other Michelin product identification in conformity with plaintiff's standards.

(c) They are required at all times to maintain and employ, in connection with their business operations under their dealer-sales agreements, such net working capital and net worth as are required to enable them to perform all of their duties, obligations and responsibilities under such agreement. They are required to maintain accounts and records of their business operations in accordance with accounting methods and standards generally accepted in the retail tire business and must submit to plaintiff financial statements and records as may from time to time be requested by plaintiff. The dealers are required to conduct their businesses in such a manner that will reflect favorable at all times on plaintiff, on Michelin products and on the name and good will thereof and to avoid any deceptive, misleading or unethical practice or advertising that is or might be detrimental to plaintiff, Michelin products, other authorized Michelin dealers or the public. [3]

(d) Plaintiff agrees to make reasonable efforts to fill the orders of the dealers that are accepted by plaintiff, but plaintiff contracts that it shall not be liable for failure to ship or for delay in shipment of Michelin products where such failure or delay shall have been due wholly or partly to shortage or curtailment of material, labor, transportation or utility

services, or to any labor or production difficulty in the plants of its suppliers, or to any cause beyond plaintiff's control or without plaintiff's fault or negligence.

(e) Plaintiff notifies its dealers of the prices of Michelin products that plaintiff will charge them. The dealers are required to pay plaintiff the dealer price and, if not included in such price, a charge equivalent to or in reimbursement of all applicable taxes on the manufacture, distribution, ownership, use or sale of the Michelin products. They are also required to pay to plaintiff any charges for the transportation of Michelin products as may be specified in plaintiff's price lists, schedules or programs. Plaintiff reserves the right to change at any time and from time to time, without prior notice, the dealer price of any Michelin product. Except as otherwise specified in writing by plaintiff, the price is the price in effect. The delivery is deemed to have been made and the order deemed filled on the date of delivery to the carrier or the dealers, whichever occurs first. In the event that plaintiff increases the price for any Michelin product, the dealers have the right to cancel any orders for such product placed with plaintiff prior to receipt of notice of such increase and unfilled at the time of receipt by plaintiff of notice of cancellation.

(f) Payment of Michelin products purchased by the dealers is required to be made when the Michelin products are placed in delivery to the dealers in accordance with the terms of plaintiff's invoice or in such other manner as plaintiff may prescribe.

(g) Notwithstanding shipment, delivery, acceptance, or risk of loss and damage, the title to each Michelin product remains with plaintiff until payment for such product is actually received by plaintiff. [4]

7. There are retail sales through plaintiff's national account department in which a national account cus-

tomer picks up tires through plaintiff's dealer system from plaintiff's warehouse facility in Overland Park, Kansas, and is billed by plaintiff for such pick-ups. There are also retail sales to employees at plaintiff's warehouse in Overland Park, Kansas.

8. Plaintiff's establishment at 9100 Quivira in Overland Park, Kansas, is a branch operation which services a geographical area which includes Kansas, Missouri, Iowa, North Dakota, South Dakota, parts of Oklahoma and Memphis, Tennessee. The branch operation distributes tires to various dealers in this area. The facility consists of a one-story brick and cinder block building with approximately 42,000 or 43,000 squre feet of storage space. There is office space in the building which is occupied by a technical representative, a leasing representative, the local sales representative and the district sales manager. The branch distribution manager and the assistant internal sales representative occupy office space in the general office area. Approximately seventeen people use or work in the facility. There is an advertising display in the doorway which describes the function of a radial tire, plaintiff's progress along those lines as the company developed and Michelin stands for.

9. The merchandise kept in the Johnson County facility consists basically of tires, tubes and flaps. A flap is a doughnut-shaped object that is a protective device inserted between the rim and the tire and tube to prevent the rim from rubbing into the tube and causing a blow-out.

(a) A record of the inventory on hand is maintained in a Kardex record keeping system. The minimum amount of any particular item required to be kept on hand is determined by the amount of sales

and fluctuates with sales. If plaintiff is not selling very much of a particular item, plaintiff does not order much of it to store. The director of distribution in New York is responsible for the determination as to the minimum amount of any particular merchandise during any given period of time. Both the distribution department in New York and the factory give the branch operations manager advance notice of what they are shipping to the Johnson County facility. [5]

(b) When merchandise arrives, it is recorded in the Kardex. All of the merchandise is manufactured outside of the United States and arrives from overseas or from Canada at the Johnson County facility in sealed containers or sea vans. They range in size from 20 to 30 feet long to 40 to 45 feet long. The merchandise is loaded into the vans or containers at the point of departure and remains in the same until it is opened by plaintiff at the Johnson County facility. The containers are transported from Canada or, after arriving by ship at Houston, Texas, from overseas, by rail.

(c) The containers or vans which arrive at plaintiff's Johnson County facility are sealed. The first thing that plaintiff does is to break the seal. The seal is a self-locking device and has to be cut. The purpose of the seal is to insure that the container has not been tampered with. After the seal is broken, the container or van is opened and is backed up to the warehouse door and unloaded.

(d) The tires are just lying or are stacked inside. Sometimes the flaps arrive loose in bundles, but the majority of the times they arrive inside the tire itself. The tubes arrive packaged in boxes. Each individual tire is in a small carton which, in turn, is in a larger carton. If plaintiff packages more than one tire, it could be like six, seven or eight tubes in their individual wrappings which are then put in a larger box.

At times, the larger boxes are broken down before they leave the premises.

(e) Generally, the tires are s! ipped to dealers, associate dealers, to other warehouses for stock transfers or to original equipment manufacturing accounts.

(f) Plaintiff's employees unload the container and place the product on pallets, which are wooden platforms used for storage.

(g) Depending upon the space available, there is a particular location for each type of merchandise, with a certain type of tire in one area, a different type of tire in another area, tubes in yet another area, etc. The foreman [6] makes the determination as to where the particular product will be stored.

(h) Orders are received by mail and by telephone. After the order is received, it goes to an employee of plaintiff who operates the Kardex on plaintiff's inventory and the order is subtracted from plaintiff's inventory at that time. From there, the order goes to another one of plaintiff's employees who types a bill of lading for the items on the sales order. The bill of lading is a shipping document pursuant to which plaintiff's employees pull the order according to the sizes, descriptions and amounts and which they use to ship tires out of the warehouse. After the bill of lading is typed, it is forwarded to plaintiff's warehouse foreman who assigns the men to pull the order and contact the truck line indicated on the bill of lading and request that the shipment be picked up.

10. The District Manager, whose office is in the Johnson County facility, is primarily concerned with sales. His functions basically consist of sales, collection of money for items sold and training men. His immediate supervisor is the vice-president of sales in New York. His district includes Missouri, excluding St.

Louis; Kansas; the southern half of Iowa; and Nebraska, excluding four or five counties.

(a) The salesmen call upon dealers who have entered into written dealer-sales agreements with plaintiff for the sale of Michelin products. Formerly, such dealers were authorized to appoint associate dealers whom plaintiff recognized as points of sale for Michelin. However, commencing with September of 1973, the said dealer-sales agreements eliminated that practice. Prior to September, 1973, plaintiff acknowledged such appointments. Since then, plaintiff does not acknowledge them, but those appointments in existence prior to September, 1973, have for the most part been maintained. Recognition by plaintiff involved the development by plaintiff of a dealer directory book showing the points of sale which would include such associate dealers. Prior to September of 1973, it was fairly routine for deliveries to be made by plaintiff to the associate dealers. [7]

(b) The sales staff regularly calls, ordinarily in person, upon the dealers. If there are any of the outstanding old contracts, they might occasionally call upon an associate dealer in the company of the dealer. The sales staff promotes the sale of Michelin products to the regular dealers and whenever possible assists such dealers in promoting their sale of those products to consumers in the community in which the dealers operate.

(c) In connection with the function of selling Michelin products to the dealers and in connection with the function of assisting the dealers in selling to their consumers, the sales staff utilizes advertising and promotional materials such as pamphlets, catalogs and directories. Occasional dealers may request promotional materials from the sales staff in which case the sales staff sees to it that the material is furnished to the dealer. Another service performed

by the sales staff is assisting the dealers with the paper work or billing if they have a problem.

(d) In those instances in which a representative of the sales staff accompanies one of plaintiff's regular dealers to talk to a consumer or some other dealer, he explains the kind of tire, the quality, the prices, etc., and assists them with promotional material, if requested. There are fifty-two dealers in this district. These would not include any associate dealers left over from the prior practice. There are twenty-one dealers in the state of Kansas. The dealer places the order with the plaintiff and it is the job of the branch operations manager to find the tires. The sales staff has nothing to do with warehousing. There is a telephone order form, which is filled out by an employee of plaintiff at the warehouse in Johnson County based upon information transmitted by telephone. Order forms provided to the sales staff are used for taking orders for Michelin Tires from the dealers. One is for truck tire orders and the other is for passenger and like commercial tires. [8]

(e) When orders are taken, the salesmen either mail the order in or phone the order in depending on how badly they need the merchandise. If the order should be called in, an employee would fill out a copy of a telephone order form. Orders on copies of order forms are usually mailed to the installation at 9101 Quivira Road in Johnson County. There are three copies of each form: One labeled Michelin warehouse copy, one labeled Michelin dealer copy and one labeled Michelin salesman's copy. The Michelin warehouse copy is mailed in. This would more than likely be directed to the Assistant District Manager at 9101 Quivira Road, Overland Park, Kansas, who, in the ordinary course of business, would be the person to receive the forms as they are mailed in. He gives them to the girls who work in the warehouse section. The dealers are required to and do pick up the tires

at the Johnson County facility.

(f) It is the responsibility of the District Manager, through plaintiff's credit department in New York, to get the money for the merchandise that he sells. The dealers send the money directly to New York. If the dealers don't send in the money, the credit manager of plaintiff in New York contacts the District Manager and advises him that they need the money. The District Manager then goes to the dealer and attempts to collect the money. The money is then sent to the New York office.

11. The local Michelin territorial representative has a geographical area encompassing the Greater Kansas City area and St. Joseph, together with four counties around that area in Missouri and the state of Kansas west to a line west of Topeka, Kansas. His immediate supervisor is the District Manager. His job as territory representative is primarily to call on the dealers; to train their personnel; to sell with their personnel; to take care of all credit problems that they may have; and to solicit new distribution as far as new dealers go. He furnishes the dealers advertising or promotional material in connection with Michelin tires and equipment. Most of the advertising and promotional material comes from New York.

(a) The local territorial representative has an office in the building at 9101 Quivira Road, Overland Park, [9] Kansas. He is in the office possibly one day a week and is in the field during the rest of the week contacting dealers. He transmits written orders either to the Assistant District Manager or to one of the girls who work in the warehouse function of the operation. The orders are then filled at the warehouse which is located in the same building or from another warehouse, in which they use the TWX machine, if the local warehouse runs out and doesn't have an item in stock. However, if the ordered item is in

stock, it would be filled from the stock on hand. The merchandise is either picked up by the dealer himself or shipped by plaintiff to him by common carrier. The girls in the office make arrangements for the shipments by common carrier.

12. A leasing representative of plaintiff maintains an office in plaintiff's building at 9101 Quirira Road, Overland Park, Kansas. Tires are leased. The job title of the representative is Service Supervisor for the Leasing Department of plaintiff for the Midwest. His immediate supervisor is the Manager of the Leasing Department at Lake Success, New York where the company headquarters is located. He has Michelin employees who do work under him who service the lease accounts. He is involved with leasing tires to bus companies on a fleet basis. His geographical area includes Chicago, Illinois; St. Louis, Missouri; Minneapolis, Minnesota; Omaha, Nebraska; Kansas City, Missouri; and Wichita, Kansas. The service involves changing bus tires off and on busses, mounting tires, repairing and re-grooving. The frequency of his visits vary. He has only been to Wichita once since he has been in this division. He communicates by letter and telephone from time to time on an irregular basis with the account in Wichita.

(a) If one were to go out and seek to promote new accounts, it would be a sales representative who inadvertently came across someone who would be apt to lease tires rather than to buy tires. It would be just a lead; the agreements are negotiated with the leasing department in New York.

13. One small area of warehouse is used for plaintiff's tire inspector who examines Michelin tires that have been under warranty and returned by dealers. His immediate supervisor is [10] a department manager

in the technical department in plaintiff's New York office.

14. A field engineer employed by plaintiff maintains an office in plaintiff's building at 9101 Quivira Road. He uses a pool secretary who is shared with the sales department, the distribution department and the leasing department. He receives his work assignments from one of the several department managers within the technical department in the plaintiff's New York office. Such as the earthmover tire product engineer manager, truck and car passenger tire manager and the man in charge of plaintiff's tire evaluation program. The field engineer works at the request of the district sales manager.

(a) It would not be unusual for a field engineer to receive a direct call from a district manager about a problem. However, before the field engineer could work on it, the district manager or the field engineer would contact plaintiff's technical department in New York which would then clear the field engineer to do it.

(b) The field engineer is concerned with product evaluation for various types of vehicle application, primarily with earthmoving tires, and he works with the mining and construction industries. He is also responsible for establishing vehicle conditions of use through survey studies. He becomes involved with persons in the sales department when a problem or alleged problem occurs resulting from misapplication of the Michelin tire or from tire abuse. They have a responsibility to keep the district sales manager, in whose district they are concerned with product evaluation aware of what they are doing.

(c) The local installation is not an earthmoving warehouse, but on occasion tires will be processed through it for an o.e.m. manufacturer, that is for

original equipment mounting. For example Isco manufactures earthmovers in Kansas City and on occasion there have been some tires stored here that are destined to go to Isco.

(d) On occasion, the field engineer gets involved in the evaluation of the various types of truck tires. These are the types of truck tires that you would ordinarily [11] find in the local Michelin warehouse. His program of product evaluation is not solely a function of gathering data but actually includes assisting people in learning how to make maximum use of Michelin products. When this occurs, it will be set up by plaintiff's sales representative or by direct contact with the man who is using the product. This is a kind of service function in the sense of providing technical information to the owner of an item in order for him to make good use of the Michelin product and to create customer satisfaction.

(e) They gather data on how the tires are performing and the information is relayed to plaintiff's New York office.

(f) If there is a claimed failure of a product, it is a matter of making an inspection of the tire. On occasion, he is contacted directly by the customer or owner of the tire or by the sales manager. He has some routine visits for the purpose of making tire inspections which are not activated by the New York office.

(g) Basically, the field engineer's function falls into two areas; going out and working with the tire owner to enable him to make the maximum use of what the tire is capable of doing, and, in the event of a claimed product failure, going out and making his own investigation and analysis of what happened.

15. Plaintiff's facility in Johnson County, Kansas, is not a bonded and licensed warehouse nor are records maintained by plaintiff, with reference thereto, all in

accordance with K.S.A. 79-304.

16. Plaintiff's warehouse is registered in Kansas as a retailer and collects and remits Kansas sales tax.

17. When plaintiff made application for authority to engage in business in the state of Kansas as a foreign corporation, it submitted a statement that the full nature and character of the business in which plaintiff proposed to engage within the state of Kansas was leasing a warehouse for the purpose of maintaining a stock of tires and selling its tires within the state, and generally carrying out its corporate purposes within the state. [12]

Rationale of Memorandum Decision

This is a suit to cause refund of an ad volorem [sic] tax imposed on tires, tubes, and flaps which are stored in plaintiff's Johnson County, Kansas warehouse. That warehouse is a storage center for imported articles to be distributed to a multistate area. The articles are imported to the United States in sea vans. Upon arrival at the Johnson County warehouse, the tires, tubes, and flaps are removed from the van, sorted, stacked, and commingled with existing inventory.

Plaintiff contends that the tax is in violation of the United States Constitution, Article 1, Section 10, Clause 2, which provides:

> No state shall, without the consent of Congress, lay any Impost or Duty on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws.

Plaintiff also states that the "Original Package Doctrine" of *Brown v. Maryland*, 25 U.S. 419 (1827), is a clear prohibition to imposition of this tax.

Defendant's contention is that the "Original Package Doctrine" is not applicable to this tax, and that if it were, plaintiff has removed the articles from their original package.

The Court must decide whether the importer has acted upon the tires, tubes, and flaps so as to cause them to be mixed up with the mass of property in the country and to lose their distinctive character as imports. *Brown v. Maryland*, supra; *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1958). When imported goods are used for the purpose for which they

— not used —

[13] are imported, they cease to be imports and their tax exemption is at an end. *Hooven & A. Co. v. Evatt*, 324 U.S. 652 (1944).

Chief Justice Marshall was the first to present a composite view of the requirement of Article 1, Section 10, Clause 2, which prohibits state taxation of imports. In *Brown v. Maryland* supra, the Court held that one who had imported goods for the purpose of selling them had by payment of the duty to the United States, acquired the right to dispose of his merchandise, as well as bring it into the country, and that the state cannot tax it while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported. This was the beginning of the "Original Package Doctrine" which has caused much difficulty to the courts of this nation. While plaintiff contends that the doctrine is absolute, Chief Justice Marshall made clear that "there must be a point of time when the prohibition ceases, and the power of the State to tax commences." *Brown v. Maryland*, supra, 12 Wheat at 441. Marshall did not make

the distinction in *Brown*, for there it was unnecessary, but he did state: ". . . the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application." *Brown v. Maryland*, supra, at 441, 442.

The United States Supreme Court has developed a number of tests to determine when a state has infringed upon a federal power designed to protect the non-importing states from discrimination by importing states. This Court is forced to examine each of the rules, determine their applicability to the present situation, and on this basis make a decision. Parties to this suit have entered into a stipulation of facts which the court considered in its decision together with all pleadings, briefs, and memorandums of counsel.

I. The Original Package Doctrine.

This case is demonstrative of the difficulty which courts have in construction of the "Original Package Doctrine" established in *Brown v. Maryland*, supra. To apply the test here, [14] it is essential to determine what the original package is. There are three possibilities: The sea vans, the group of goods, and the single items, (that is, each tire, tube, and flap as a single original package).

If the sea vans are the original package, it is clear that once the items were removed and commingled, the original package was broken. Plaintiff contends that the sea vans are not the original package but a transportation device. Plaintiff's citation to the Code of Federal Regulations 49 C.F.R. 420, 19 C.F.R. 10.41 does not establish any criterion for the constitutional

"original package". In *F. May & Co. v. City of New Orleans*, 178 U.S. 496, 509 (1909) the United States Supreme Court directly addressed the question of whether shipment packages were the original package:

> In our judgment, the original package in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for sale or delivery of separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits.

Logically, a package may be employed both as a means of shipment and storage. Here the ship was the primary means of transport, the van was a means of storage. It seems clear that *Brown*, supra, as well as *Youngstown*, supra, contemplate the package to be the one to which the customs seal of the United States was attached. From the material submitted by plaintiff it is clear that the total value of the shipment was the basis for the duty, and each van had a custom's seal attached to it. However when the vans reached the Johnson County warehouse, the seal was broken and the items removed. This is strong evidence that the original package was violated. Plaintiff's citation of *Leather's Best, Inc. v. S. S. Mormaclynx*, 313 F.S. 1373 (E.D.N.Y. 1970) and *Michigan State Tax Commission v. Garment Corp. of America*, 32 Mich. App. 715 (1971) are not persuasive. In the latter case, the goods were grouped inside the van into characteristic original packages, and that is not the case here. [15]

A second possibility is when the items were grouped into original groupings inside the sea van. In cases where it is impossible or unreasonable to package the goods, the aggregation of articles imported may con-

stitute the original package. See *Volkswagen Pacific, Inc. v. City of Los Angeles*, 496 P.2d. 1237 (1972); *E. J. Stanton and Sons v. Los Angeles County*, 177 P.2d. 804 (Calif. App., 1947). Similar cases are found in *Hooven & Allision Co. v. Evatt*, 324 U.S. 652 (1944). In that case the Court held that fiber bales imported into the United States for manufacture retain character as an import "while remaining the property of the importer, in the original form or package in which it was imported." (324 U.S. at 655). In this case this property was commingled with the other property in the same warehouse and employed as needed to satisfy supply requirements. Thus, the case is more like *Youngstown Sheet and Tube v. Bowers*, supra. There the Court held that "piles" of ore in "stock bins" had been sufficiently commingled with other supplies as to lose their character as imports. The Court holds that, when the items in the aggregation are separated into separate classifications and made available for use, it is, per se, a violation of the original package. Therefore, plaintiff is not saved by this second criterion.

Plaintiff submits that each tire, tube and flap is an original package because each tire can be distinguished from any other item because it is serialized. *Florida Greenheart Corp. v. Gautier*, 172 So.2d. 589 (1965) is cited by plaintiff to support his contention. In that case the individual nature of the item was incidental. The issue was whether the item when offered for sale lost immunity from taxation. It was held in *Hinson v. Lott*, 75 U.S. 148 (1827):

> . . . in discussing the landmark case *Brown v. State of Maryland* (supra) . . . (the United States Supreme Court) said with regard to foreign imports in the hands of the importer: "*** as soon as they passed out of his hands into use, or were offered

> for sale among the community at large, they would be liable to a tax." [16]

Youngstown Sheet & Tube Co. v. Bowers, supra, has the same effect. Thus, assuming arguendo, that plaintiff is correct that each item is an original package, plaintiff must pay the tax because it has both commingled the property and allowed it to come within the general mass of property within the state. Thus, the holdings of *Department of Revenue v. James B. Beam Distilling Company*, 377 U.S. 341 (1964) is not applicable. In that case, the original packages, containing more than one unit, remained in the hands of the importer prior to use, sale, or offering for sale, and were immune from tax. This is not the case here. Plaintiff offered items for sale to employees and national account customers without distinguishing inventories.

Therefore, the Court specifically determines that the tires, tubes, and flaps are not original packages. Inventory accounting by use of serial numbers on each tire to maintain segregation is non-evident, and there is no indication of serialization of tubes or flaps. To hold otherwise would open the door to continuous breakdown of original packages after importation thus allowing each original package to generate many "original packages"; this result would be untenable.

Under the "Original Package Doctrine" the result from analysis of the contentions of the plaintiff is the same. Plaintiff has both broken the original package and commingled the goods with the mass of property in the state.

II. Incorporation of Imports Into Mass of Property

In 1934 the United States Supreme Court decided *Baldwin v. Seelig*, 294 U.S. 511 (1934), which this Court

recognizes was an interstate commerce case rather than a foreign commerce case. In that case, Mr. Justice Cardozo writing for the Court said:

> The test of the original package which came into our law with *Brown v. Maryland*, supra, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries * * * the original package is not the ultimate principle. It is an [17] illustration of a principle . . . It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. (294 U.S. 526, 27)

Initially, the Court made a distinction to the above formula in cases dealing with foreign commerce. There the important consideration was maintaining the exclusive power of federal taxation on imports.

Today, the "Original Package Doctrine" in importation cases is recognized to be the same test as applied in *Baldwin v. Seelig*, 294 U.S. 511 (1934). As the Court said in *Youngstown Sheet & Tube Company v. Bowers*, supra at 548:

> Breaking the original package is only one of the ways by which packaged goods that have been imported for use in manufacturing may lose their distinctive character as imports. Another way is by putting them "to the use for which they were imported."

Plaintiff attempts to distinguish *Youngstown* on the basis that in that case, the goods were imported for use and not sale. In view of *Hinson v. Lott*, supra, and *F. May and Co. v. New Orleans*, supra, that distinction

seems meaningless. Justice Marshall did not make this distinction in *Brown v. Maryland*, supra. He recognized an exception when the importer sells the goods or breaks up his packages and travels with them as an itinerate "peddlar." Justice Whittaker writing for the Court in *Youngstown* adopted the *Brown v. Maryland* rule as stating that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has lost its distinctive character as an import, and has become subject to the taxing power of the State. It is interesting to note that this case is distinguishable from *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218 (1932) at 225 and other cases of similar holding in that in those cases the goods were not in any manner commingled with and did not become a part of the general mass of property in the country. In *Youngstown*, the activity of the importer which subjected the [18] import to the tax was the placement of the materials in "piles" in "stock bins" as a storage device thereafter feeding the materials into the factory furnaces, as the daily needs of the factory required.

Plaintiff maintains his warehouse in a similar manner. Goods are segregated into "stacks" or "piles" upon wooden pallets in plaintiff's warehouse. As required, the tires, tubes, and flaps are distributed from the common mass to their retail customers and dealers within and without the state. Without any segregation plaintiff also makes distribution to both "national accounts" and employees from the general stock of the warehouse. There is no segregation of the mass of goods which have come to rest in Kansas and those

which plaintiff contends are still in interstate commerce. See *Youngstown*, supra.

Removal of the tires from the vans and sorting and stocking them caused the aggregate to be broken up. For legal purposes, this constituted a breaking of the original package and the ad valorem tax was properly applied.

Plaintiff further acted to destroy the tax immune status of the tires by putting them to the use for which they were imported in such a way as to comingle them with the mass of property in the state. By placing the tires in inventory with its other property, Michelin caused the tires to lose their identity as imports.

Hooven and Allison v. Evatt, 324 U.S. 652 (1945), and *Youngstown Sheet and Tube Co. v. Bowers*, supra, clearly established the "put to use" rule with regard to imports. ". . . goods brought into this country by an importer 'for his own use' and here 'used' by him are to be regarded as part of the 'common mass' of property and are not immune from state taxation." *Youngstown Sheet and Tube Co. v. Bowers*, supra. Likewise in accord are *American Mennex Corp., v. Cronvich*, 207 So2d 778 (la. 1968); *Volkswagen Pacific, Inc.*, supra; and *E. J. Stanton and Sons*, supra.

Of great importance is a decision handed down by the Supreme Court of Georgia on February 4, 1975. *Wages, Comr., et al. v. Michelin Tire Corp.* was a factual situation quite similar to the instant case with regard to the imported tires. The court ruled that:

> . . . the entire Michelin tire inventory was unpackaged, and all shipments in the inventory were commingled and stored by sized and type to make the individual units immediately available for resale. We therefore hold that the tires, imported

> in bulk without packaging, which have been sorted, segregated by size and style and commingled with other shipments have lost their status as 'imports' and are subject to taxation.

The Court determines that plaintiff, in making distribution of goods to customers from a common mass which has lost its character of an original package in interstate commerce, is not entitled to an exemption from taxation upon the basis of Article I, Section 10, Clause 2 of the United States Constitution.

It is therefore considered, ordered and adjudged that plaintiff take naught and that the costs of this action be and they are hereby taxed to the plaintiff.

The Clerk of the Court is directed to enter the judgment herein announced of record as of this date and it shall be effective as of this first day of July, 1975.

/s/ HAROLD R. RIGGS

HAROLD R. RIGGS
District Judge, Div. 4

[20]

Supreme Court, U. S.
FILED
AUG 29 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, TAX COMMISSIONER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF OF STATE OF KANSAS AND JOHNSON COUNTY, KANSAS AS AMICI CURIAE

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CONSTITUTION CITED

Constitution of the United States, Article I, Section 10, Clause 2 2

TEXTS CITED

Annotation: 26 A.L.R. 971 (1923) 3

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, TAX COMMISSIONER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF OF STATE OF KANSAS AND JOHNSON COUNTY, KANSAS AS AMICI CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (Pet. App. B, pp. A-6—A-18) is reported at 214 S.E.2d 349.

QUESTION PRESENTED

Whether tires imported by petitioner in bulk and without individual packaging, which, after arrival at its warehouse, were sorted and separated as to size and style and stacked on wooden pallets with other tires in the warehouse so that individual shipments were no longer separate and identifiable units, are nonetheless immune from local ad valorem taxes by reason of Article I, Section 10, Clause 2 of the Constitution of the United States?

INTEREST OF AMICI CURIAE

The *amici curiae* respectfully submit their brief pursuant to Supreme Court Rule 42(4). The specific reason that *amici curiae* are concerned in this matter is that they are presently involved in litigation with petitioner herein, Michelin Tire Corporation, on facts substantially similar to those presented herein, and that the Johnson County (Kansas) District Court rendered a decision in favor of the State of Kansas and Johnson County, Kansas which ostensibly parallels that of the Georgia Supreme Court's decision. (*Michelin Tire Corporation* v. *Board of County Commissioners, et al.*; Case Nos. 54594, 45432, 58006 and 59905; decision dated July 1, 1975.)

ARGUMENT

Petitioner So Acted Upon Its Property That It Became a Part of Petitioner's Inventory and Became Incorporated and Mixed With the Mass of the Property in the Country, Thus Losing Its Character As an Import

Petitioner claims that the unpackaged imported tires held for sale and distribution by petitioner in its warehouse were in the original form in which they were imported and, relying upon *Brown* v. *Maryland,* 25 U.S. 419 (1827), asserts that they were immune from local taxation.

Parenthetically, the *amici* take the position in Kansas that the container or sea van is the original package. In *F. May & Company* v. *City of New Orleans,* 178 U.S. 496, 44 L.Ed. 1165, 20 S.Ct. 976 (1900), although it was contended by the importer that the box, case or bale was not the original package but that each separate parcel or bundle placed within such box, case or bale was itself an original package. *Id.* at 502, 44 L.Ed. 1167, 20 S.Ct. at 978, this Court concluded that the original package was the box or case in which the separate parcels were shipped. *Id.* at 509, 44 L.Ed. at 1170, 20 S.Ct. at 981. In an annotation entitled "What is an 'original package' within interstate or international commerce?" [26 A.L.R. 971 (1923)], it is stated:

> "It is well settled that where an aggregation of articles or packages is for convenience in shipping, packed and shipped in a larger package or receptacle, such larger package or receptacle and not the individual articles or packages comprising the larger unity, constitutes the original package of commerce." (*Id.* at 974-975)

In *Volkswagen Pacific, Inc.* v. *City of Los Angeles,* 101 Cal. Rptr. 869, 496 P.2d 1237 (1972), appellant wholesaler

imported, *inter alia,* automobile parts in sea vans and Volkswagen and Porsche automobiles. The California court concluded at p. 875 that:

> "Uncontroverted evidence shows that once the individual packages were removed from the sea van, VW and Porsche distributed those packages to local dealers. Hence, even if VW and Porsche acted as importers up to the moment that the vans were brought to the warehouse, once they entered the vans to remove the individual packages they did so with the intent and effect to act as wholesalers in 'the mass of property in the country. . . .' (*Brown* v. *Maryland, supra,* 25 U.S. at 441.) Therefore, they cannot avail themselves of the constitutional immunity from local taxation." 496 P.2d at 1243.

However, since the Supreme Court of Georgia in the instant case declined to accept that theory, presumably that issue is no longer involved in this matter as far as the respondents are concerned.

The *amici* contend that petitioner attempts to rely on a mechanistic approach to the solution of the problem and attributes a controlling significance to *Brown, supra,* that, if it ever did exist, certainly no longer exists. Even in *Brown, supra,* the Court recognized that the problems under the export-import clause are not susceptible to easy solution noting as a preliminary to the rule cited by petitioner, that:

> "The power [to tax persons and property], and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Until they do arise, it might be premature to state any rule as being universal in its application." *Brown* v. *Maryland,* at p. 439.

In *Hooven & Allison Company* v. *Evatt,* 324 U.S. 652, 667, 89 L.Ed. 1252, 65 S.Ct. 870 (1945), the Court held that goods imported for use share the same immunity as goods imported for sale and that goods imported for manufacture do not lose their character as imports any sooner or more readily than imports for sale.

Subsequently, the Court in *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U.S. 534, 3 L.Ed.2d 490, 79 S.Ct. 383 (1959), consolidated cases involving, on the one hand, the importation of ore for use in a manufacturing process and, on the other hand, the importation of lumber and veneer, some as loose boards and some in bundles, for use in the manufacturing process, the court concluded:

> "Whatever may be the significance of retaining in the 'original package' goods that have been so imported for sale . . . goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the 'original package' if, as found here, they have been 'put to the use for which they were imported'." *Id.* at 548, 3 L.Ed.2d at 490, 79 S.Ct. at 391.

The Court, noting that breaking the original package was only one of the ways by which packaged goods may lose their distinctive character as imports, stated that another way was by putting them to the use for which they were imported.

> "The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When, after all phases

of their importation had ended, they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, they stood in the same relationship to the State as like piles of domestic materials at the same place that were kept for use and used in the same way. The one was then as fully subject to taxation as the other. In those circumstances, the tax was not on 'imports', nor was it a tax on the materials because they have been imported, but because at the time of assessment they were being used, in every practical sense, for the purposes for which they had been imported. They were therefore subject to taxation just like domestic property that was kept at the same place in the same way for the same use." *Id.* at 549-550, 3 L.Ed.2d at 500-501, 79 S.Ct. at 392.

Then the Court recognized the underlying economic consideration involved in the *Youngstown* case (which is necessarily involved in this case also):

> "We cannot impute to the Framers of the Constitution a purpose to make such a *discrimination in favor of materials imported from other countries* as would result if we approved the views pressed upon us by the manufacturers. Compare *May* v. *New Orleans*, 178 U.S. at page 509, 20 S.Ct. at page 980." *Id.* at 550, 3 L.Ed.2d at 501, 79 S.Ct. at 392. [Emphasis supplied.]

Earlier in the opinion the Court had defined the purpose of the export-import exception:

> "The constitutional design was then to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports. Hence, that design is not impinged by the taxation of

> materials that were imported for use in manufacturing after all phases of the importation have ended and the materials have been 'put to the use for which they [were] imported' . . . for in such a case they have lost their distinctive character as imports and are subject to taxation." *Id.* at 545, 3 L.Ed.2d at 498, 79 S.Ct. at 389.

Thus, the Court recognized in *Youngstown* that to extend the period of exemption beyond that needed for completion of the importation process would discriminate against persons or firms dealing in domestic supplies. The Court spoke so unequivocally in *Youngstown* that, in a sense, the real issue in this case is whether the petitioner can sufficiently distinguish the facts of its case so as to avoid the consequences of the *Youngstown* decision.

To hold in this case that petitioner, in competition with other firms in Georgia and Kansas distributing and selling tires, may receive and enjoy the municipal benefits provided by ad valorem taxation after the Federal import duties have been paid and after the importation process has been completed without payment to such ad valorem taxes would be to ignore the defined purpose of the export-import laws, as decribed in the *Youngstown* case and to constitute a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Predating the *Youngstown* case was the California case of *E. J. Stanton & Sons* v. *Los Angeles County*, 78 Cal. App. 2d 181, 177 P.2d 804, cert. den. 332 U.S. 766, 68 S.Ct. 75, 92 L.Ed. 352 (1945), concerning lumber shipped from overseas. The importer contended that so long as any parcel of the entire lot remained in the possession of the importer, it was not subject to state taxation prior to sale and that each parcel or board was marked so as to distinguish it from all others and, therefore, in itself was an original package.

The County defendants argued that by the sorting, segregating and tallying of the timbers, and by virtue of sales from the cargoes received, the remainder being offered for sale became a part of the mass of property in the country and thus subject to taxation. *Id.* at 183-184, 177 P.2d at 805-806. The Court held that the unit of importation was the original package and not its constituent elements; that is, the cargo or whole shipment itself and, when, even though in the warehouse of the importer, it was sorted and classified as to facilitate its sale, and portions thereof were sold until the pile was depleted and the remnants thereof were commingled with new shipments of the same type of timbers, a reasonable construction of Section 10 and interpreting decisions compelled the termination of immunity of such broken lots and commingled remnants of imported lumber. *Id.* at 187-189, 177 P.2d at 807-808.

Subsequent to the *Youngstown* opinion, a somewhat similar case confronted the Supreme Court of Louisiana in *American Mannex Corporation* v. *Cronvich*, 251 La. 1014, 207 So.2d 778 (1968), involving shipments of tubular steel oil well casings. The issue, as posed by the court, was whether articles which, because of their physical nature, are inexpedient, inconvenient or too costly to transport in packages, were to be considered as separate packages or whether the entire lot or shipment covered by the bill of lading was to be considered as the original package. *Id.* at 1026, 207 So.2d at 782. The Court stated:

> "We have no hesitancy in concluding under the facts of this case, that the original packages of casings imported by plaintiff comprised all casings covered by bills of lading and that, when those casings or joints were stored in the warehouse and assorted with other tubing of like dimensions and quality, they were commingled and, in reality, formed part of the retail importer's inventory, thus becoming irrevocably committed to the purpose for which they were ultimately destined, i.e., sale and disposal by plaintiff, under the ruling in the *Youngstown* case. In any case, when a portion of the shipment was sold at retail to plaintiff's customers, all of the joints covered in the bill of lading, which we regard factually, as well as fictitiously, as the original package, lost their previous status as imports and became subject to local taxation. See *May & Co.* v. *City of New Orleans, supra.*"

Volkswagen Pacific, supra, concerned a wholesale distributor of automobiles and automobile parts imported from Germany. *Id.* at 872, 496 P.2d at 1240. Both Volkswagen and Porsche maintained a sales organization with a general sales manager and zone operation managers who assisted dealers with technical, administrative and sales problems. *Id.* at 873, 496 P.2d at 1241. The *amici* believe that a reading of the case indicates that said firms maintained a wholesale distribution system similar to that in this case. The *Volkswagen Pacific* case dealt with two categories of shipments: (1) parts imported in sea vans, and (2) automobiles shipped unpackaged. *Id.* at 874, 496 P.2d at 1242. The parts were conveyed in sea vans to the wholesale distributor's warehouse where they were removed and held until delivered to a dealer. *Id.* at 873, 496 P.2d at 1241. Volkswagen Pacific, Inc. maintained a "five months" inventory of parts, most of which were imported from Germany, although some were supplied by American manufacturers. Upon the arrival of the automobiles, some were transported by an agent of Volkswagen Pacific, Inc. to its dealers to whom they had already been allocated. During the taxable years involved the demand for Volkswagen automobiles exceeded the supply. The remainder

were held in the wholesale distributor's inventory which, commencing in June of 1966, ranged to a high of 9,000 cars. *Id.* at 872, 496 P.2d at 1240.

The California court concluded that the constitutional immunity existed only until the imports are sold or put to the use for which they are imported, citing the *Hooven* case, *supra*. *Id.* at 875, 496 P.2d at 1243. The court observed that it would not follow as a matter of law that the removal of the parts from the sea vans would terminate the exemption, noting that it might be accomplished so that the importer could by other means of transportation direct his imports to his outlets in different interior states. As to *Volkswagen Pacific, supra*, the court stated:

> "In the context of the instant case, however, the opening of the sea van did signify a breaking of bulk 'for the sale or delivery . . . of the separate parcels contained in it' [referring to the *May* case, *supra*], so that California governments may properly tax those separate articles. Uncontroverted evidence shows that once the individual packages were removed from the sea van, VW and Porsche distributed those packages to local dealers. Hence, even if VW and Porsche acted as importers up to the moment that the vans were brought to the warehouse, once they entered the vans to remove the individual packages they did so with the intent and effect to act as wholesalers in 'the mass of property in the country . . . .' (*Brown* v. *Maryland, supra*, 25 U.S. at p. 441.) Therefore, they cannot avail themselves of the constitutional immunity from local taxation.

A more difficult problem exists with reference to the automobiles. They are not shipped in packages, crates or boxes. Thus it is neither possible nor desirable that the validity of the tax here imposed be determined by an artificial effort to create a hypothetical 'original package.' '[T]he test of the original package is not an ultimate principle. It is an illustration of a principle. [Citation] It marks a convenient boundary and one sufficiently precise save in exceptional conditions.' (Where packaging is inherently impossible or impracticable, an imported, unpackaged item loses its immunity from state or local taxation when it is removed from an aggregate of other similar unpackaged items imported as a unit with it.) *Baldwin* v. *G.A.F. Seelig,* 294 U.S. 511, 526-527 [55 S.Ct. 497, 79 L.Ed. 1032, 1040, 101 A.L.R. 55]; see also *E. J. Stanton & Sons* v. *County of Los Angeles,* 78 Cal. App. 2d 181 [177 P.2d 804], hg. den., cert. den., 332 U.S. 766 [68 S.Ct. 75, 92 L.Ed. 352], lumber imported unpackaged held subject to local tax when removed from aggregate of lumber imported by ship and stacked at a local yard; see also *Simon* v. *County of Los Angeles,* 141 Cal. App. 2d 74, 78-79 [296 P.2d 381].) In the case at bench, each automobile was imported unpackaged as part of an aggregate of similarly unpackaged items. Appellants, who claim the immunity from tax and thus bear the burden of establishing the conditions for its existence, have failed to prove that packaging of the automobiles was possible or practicable. Similarly, they have failed to prove that any practical or possible method of packaging would not have been one which of necessity would have required removal of the automobiles from the package for delivery to the dealers to whom they were sold. We thus determine that the trial court properly concluded that the automobiles here involved were not immune from taxation by the import-export clause of the United States Constitution." *Id.* at 875, 496 P.2d at 1243.

The *amici* submit that the Supreme Court of Georgia was correct in deciding in this matter that petitioner's tires were not immune to local taxation. After an extensive review of cases, the court concluded:

> "Appellants' third argument is that imports lose their character as such when sorted and commingled with other shipments preliminary to sale. As we read *Brown* v. *Maryland, supra,* it establishes a 'two-hat' approach to importers for resale. Such importers are free to deal with their goods as imports after the goods are in this country; and, if they do so, the goods remain immune from state taxation. When, however, the importer deals with his goods as a seller, he becomes chief justice marshal's 'itinerant peddler'; and the goods become subject to state taxation. The original packaged doctrine is not a mechanical, universally applicable test; it is, instead, a useful means in many cases of determining which hat the importer-seller is wearing, because frequently the act of breaking the original package is preliminary to converting the imports to salable units.
>
> In the case at bar, the entire Michelin tire inventory was unpackaged, and all shipments in the inventory were commingled and stored by size and type to make the individual units immediately available for resale. We therefore hold that the tires, imported in bulk without packaging, which have been sorted, segregated by size and style, and commingled with other shipments have lost their status as 'imports' and are subject to taxation."

The *amici* submit that, if the containers or sea vans were not packages within the meaning of the original package doctrine, the aggregation of tires in each shipment con-

stituted the original package and, upon the unloading of the containers or sea vans, any metaphysical unity that a shipment may have had an aggregation of items was destroyed when the tires were moved from the container and sorted according to type and size into the various areas of petitioner's warehouse. By injecting the tires into its current inventory designed to service its wholesale distribution wherein such property, as a part of petitioner's constant on-going distribution system, was irrevocably committed to said purpose and was immediately subject to order by petitioner's dealers and customers, such property lost its character as imports. To hold otherwise would be to fly in the face of economic and legal reality. To hold in favor of petitioner would permit petitioner to maintain a profitable business venture, not only in the states of Georgia and Kansas, but elsewhere in the United States, which would enjoy without payment therefor all of the municipal benefits provided by ad valorem taxation in said areas. This would constitute an invidious discrimination in favor of petitioner and against similarly situated firms whose current and on-going inventories contained domestic articles, and in effect, would constitute a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution. When viewed in this manner, it becomes readily apparent that none of the foregoing results were the rationale behind the export-import clause. The rationale behind the export-import clauses has been fully served once the property has come to rest and has been injected into and becomes a part of petitioner's on-going commercial operation.

CONCLUSION

For the foregoing reasons the *amici* respectfully pray that the judgment of the Supreme Court of Georgia be affirmed.

Respectfully submitted,

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No. 74-1396

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Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

AMICUS CURIAE BRIEF

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CITATIONS

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AMICUS CURIAE BRIEF

I. Introduction

The Tax Commissioner of Ohio is concerned about the case at bar due to the fact that petitioner operates a distribution warehouse like the one in Georgia in the city of Cleveland, Ohio. The imported goods are handled in the same fashion at both locations. If petitioner succeeds in its argument concerning immunity from state taxation of the property in the case at bar, then the same argument will be binding with respect to the treatment of the imported inventory at the Cleveland facility. Such a result would decrease the tax base in Cuyahoga County, Ohio, to the detriment of other taxpayers in that location.

II. The Constitutional Issue

The Court is called upon to decide herein whether the general personal property tax of the State of Georgia may apply to imported tires shipped in bulk in a large container and

tire tubes shipped in small boxes in vans and trailers, which are unloaded at a Georgia warehouse and are stacked according to size and style while awaiting sale to retail dealers. The Court is urged by petitioners to declare the Georgia ad valorem levy of tax upon such goods void as an impost or duty upon imports violative of Art. I, Sec. 10, Cl. 2 of the Federal Constitution.

The brief filed on behalf of other amici by the Los Angeles, California, county counsel has advanced well-drawn historical, textual, and case law arguments which urge the Court to sustain the tax. This brief will focus upon one of the arguments advanced by those amici – that of the application of the principles of *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534 (1959), to the case at bar. Such an application would result in the validation of the levy upon the imported goods in the case at bar, while preserving the intent and structure of the "original package doctrine" as it has been interpreted by this Court. For although the Tax Commissioner of Ohio agrees with the amici on the historical arguments advanced to the effect that Art. I, Sec. 10, Cl. 2 was only meant to apply to *discriminatory* levies, it is perhaps too late in the day to replace a time-honored doctrine of the Court with an "intent of the Framers" argument. In fact, this Court has rejected a similar historical argument when it was made with regard to the export side of Art. I, Sec. 10, Cl. 2. *See Richfield Oil Co.* v. *State Board of Equalization*, 329 U.S. 69 (1946).

The other amici have capably set out the historical and textual arguments in support of the "discriminatory" levy position. They are there for the Court to call upon should it decide the shackles of the past are too confining. This brief, however, will argue for the application of *Youngstown Sheet & Tube Co.* v. *Bowers, supra*, to the case at bar, as a matter of the practical balancing of interests which comprises the "original package doctrine."

III. The Original Package Doctrine – What It Has Come To Mean

A. *Brown* v. *Maryland, May* v. *New Orleans,* and *Hooven & Allison Co.* v. *Evatt.*

It almost goes without saying that Chief Justice Marshall was not laying down an ironclad rule in *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419 (1827), wherein the "original package doctrine" had its inception. The breaking of the import package was discussed in that case because the challenged tax was on such packages. But, as forcefully argued by the other amici, the breaking of the package was not intended to be the sole criterion in determining the immunity. The opinion set forth a nonexclusive list of the factors to be considered in determining whether goods are "imports" exempt from state taxation. One of these factors was whether the goods were brought in by the importer "for his own use" and were "used" by him. If they were, they had become part of "the common mass" of property not immune from state taxation. 25 U.S. (12 Wheat.) at 443. This factor was used along with the others to determine specifically whether the importer had "so acted upon the thing imported" so as to mix it up with the common mass of property, thus losing "its distinctive character as an import." 25 U.S. (12 Wheat.) at 441-2.

May v. *New Orleans*, 178 U.S. 496 (1900) involved imported items packaged in small parcels and received from abroad in large crates. The importer broke the crates in order to expose the smaller packages for resale. New Orleans imposed a property tax on those packaged items so held for resale. The Court found that the large crates were the "original packages" and held that the tax was constitutional because the parcels were being used by the importer, *viz.*, they were being held for resale. 178 U.S. at 509.

Both *Brown* and *May* involved the merchandising inventory of importer sellers. *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945) concerned the manufacturing inventory of an im-

porter manufacturer. There, the Court determined that the Import-Export Clause was equally applicable to goods imported for manufacturing. The case was anomolous because while it stated that when imports are "used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end" (324 U.S. at 665), the goods in that case were held to be exempt from state taxation because they were imported by the manufacturer "for his own use." The ultimate holding of the Court thus seemed to be in direct contravention of *Brown* v. *Maryland, supra,* at 441-3.

B. *Youngstown Sheet & Tube Co.* v. *Bowers*

The ultimate holding of the Court in *Hooven & Allison Co.* v. *Evatt, supra,* was arguably overruled *sub silentio* by the Court in *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U.S. 534 (1959). The Court in *Youngstown* pointed out that the decision in *Hooven* was basically in accord with the tenets of past import tax cases. Although *Hooven* did state that a manufacturer's goods imported "for his own use" were immune, which was in contravention of the holding of *Brown* v. *Maryland, supra,* the language of the decision did indicate that it was in accord with the basic proposition in *Brown* that when imported goods are put to the use for which they were imported, they cease to be imports. 358 U.S. at 542.

The Court in *Youngstown* held that because the importer had imported the goods to supply its "current operating needs" they were subject to state taxation "because at the time of the assessments they were being used, in every practical sense, for the purposes for which they had been imported." 358 U.S. at 359. *Hooven* was distinguished on its facts as being a case not involving goods used for "current operational needs." 358 U.S. at 544. The Court in the companion case to *Youngstown* made it clear that the fact that wood veneers were received in bundles was inconsequential with regard to goods for use in manufacture. If they were imported and intended to be used for "current operational needs", they were amenable to tax-

ation whether or not the "original package" was broken. 358 U.S. at 548. The Court concluded that allowing an exemption to attach to a manufacturer's goods imported to be used for "current operational needs" would discriminate in favor of imported manufactured goods, to the detriment of domestically produced goods, and that result could not be imputed to the Framers of the Constitution. 358 U.S. at 550.

IV. The Practical View of Brown v. Maryland

As was emphasized by the Court in *Brown* v. *Maryland, supra,* and noted by the Court in *Hooven & Allison Co.* v. *Evatt, supra*: "[R]econciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter." 324 U.S. at 668. Because the "current operational needs" test of *Youngstown Sheet & Tube Co.* v. *Bowers, supra,* goes to the true basis of the "original package doctrine," *viz.*, goods retain their import character until used for the purposes for which they were imported, that test should be applied in the case at bar even though it involves an importer seller.

It may be that the same result may be reached in importer seller cases as under the "current operational needs" test applied to importer manufacturers. *Brown* v. *Maryland, supra,* made clear that the true object of the tests proposed in that case was to determine if the importer has treated the goods as part of the general mass of property in the country. One of the ways to determine that was to determine if the original package had been broken. But *Brown* clearly did not intend that an unbroken package *ipso facto* was still an import. That decision also provided that another test to determine the quality of the goods was whether the goods were imported for the importer's own use and were used by him here.

May v. *New Orleans, supra,* applied this last test to an importer seller. Although the Court in that case determined that the large shipping crate containing the smaller packages was the "original package" for the purposes of the application of the

first test of *Brown*, part of the *ratio decidendi* in that case was the fact that at the time of the assessment, the smaller unbroken packages "were in the market for sale" and therefore "subject to be taxed as like property, in the same condition, that had its origin in this country." 178 U.S. 509. The above language from *May* seems to be a statement of the "current operational needs" test used by the Court in *Youngstown* with regard to the imported raw materials of a manufacturer. If an importer seller factually makes the imported goods available for sale (the analogue of "current operational needs" for a seller), they have lost their character as imports just as goods to be used by a manufacturer for "current operational needs." That position was urged by the Tax Commissioner of Ohio and was adopted by the Supreme Court of Ohio in the recent case of *Columbus Steel Supply Co.* v. *Kosydar*, 38 Ohio St. 2d 258 (1974).

Of course, as in *May*, the Ohio court did deal with the "original package" issue, resolving it in favor of the Tax Commissioner with a "commercial unit" analysis, i.e., the "original package" involved was the commercial unit of importation, and when the imported goods at issue were separated from the aggregate of goods comprising the shipment, the package was "opened." After the Supreme Court of Ohio discussed *Brown* v. *Maryland, supra*, and *May* v. *New Orleans, supra*, it used the following language in upholding the levy:

> "We recognize that the case law which embodies the original package doctrine has established a general focus of inquiry which, in the final analysis, requires an evidentiary determination that the actions of the importer upon the imported items caused a cessation of the tax immunity.
>
> "Appellant acted upon the pipe in this way: As the pipe was unloaded, appellant severed bands around some of the pipe in the commercial unit; the unit was then distributed in a sorting process where like pipes were gathered together; the pipe was placed in segregated stacks, presumably with like pipe which had arrived in previous imported shipments; the pipe then became in-

> ventory stock exhibited for sale; and pipe was removed piecemeal from the stacks for sale to buyers.
>
> "In light of those facts, we hold that appellant so acted upon the imported steel pipe as to cause the pipe to become incorporated and mixed up with the mass of property in this state • • •." 38 Ohio St. 2d at 263

Undoubtedly, in this case, as in *May* and *Columbus Steel Supply*, the Court could deal with the "package" issue by means of a "commercial unit" analysis. Such an analysis would demonstrate that the commercial unit of importation was the van or trailer and that the separation of the tires and tubes from that container constituted "breaking" the package. The point of this brief is that such machinations need not be part of the analysis. *Brown* v. *Maryland, supra*, did *not* declare that an imported package must be broken to be considered taxable.

V. Conclusion

In summary, it is submitted that just as the importer manufacturers in *Youngstown Sheet & Tube Co.* v. *Bowers, supra*, were held to be not immune from state taxation because they were factually determined to have used the goods taxed for "current operational needs," so too should an importer seller such as Michelin be held not immune from state taxes when it has factually treated the goods as current inventory. *May* v. *New Orleans, supra*, provides the basis for such a holding. Additionally, it should be made clear that breaking the package of the commercial unit of importation is not the *sine qua non* of the application of such "current inventory" test. Just as the veneer bundles being unbroken was inconsequential in the companion case to *Youngstown* because of the Wisconsin court's factual determination that the goods lost their import quality because the importer had used them for his "current operational needs," so too should it be unimportant that an importer seller's packages are unbroken, if it is factually determined that the goods are currently held for sale. That the package has not been broken is only one of the several

factors to be considered in determining whether factually the goods have lost their quality as imports by virtue of the importer's treatment. *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U.S. at 548-9. Importer manufacturers and importer sellers should be treated the same in making the factual determination of whether the goods remain imports. Neither Art. I, Sec. 10, Cl. 2, nor *Brown* v. *Maryland, supra,* authorizes different treatment of these two categories of importers.

The amicus curiae Tax Commissioner of Ohio urges the Court to find that the Georgia ad valorem property tax levied on Michelin's goods in this case is valid and not violative of Art. I, Sec. 10, Cl. 2 of the United States Constitution.

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IN THE

Supreme Court of the United States

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No. 74-1396

MICHELIN TIRE CORPORATION,

Petitioner,

vs.

W. L. WAGES, Tax Commissioner, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

REPLY BRIEF FOR THE PETITIONER

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A. Congress, Rather Than This Court, Is The Appropriate Tribunal To Consider And Pass On The Arguments Which Are Relied Upon By The Tax Officials In Support Of Their Request That This Court Overrule *Brown* v. *Maryland*, *Low* v. *Austin* And Other Decisions Interpreting And Applying The Import-Export Clause.

It is understandable that state and local tax officials would be zealous in their efforts to enlarge their taxing power by attempting to confine limitations imposed thereon by the Federal Constitution, and in their respective briefs the Respondents and the California, Georgia and Kansas Amici present with impressive skill and thoroughness various arguments in favor of limiting drastically the immunity of imported goods from local taxation.

The arguments presented on behalf of the tax officials fall into two groups, as follows:

First, are arguments which ask this Court to overrule *Brown* v. *Maryland, Low* v. *Austin* and other decisions interpreting and applying the Import-Export Clause. As more fully shown below under this heading, we believe that Congress, rather than this Court, is the appropriate tribunal to consider and pass on this group of arguments.

Second, are various arguments presented by the tax officials which would lead to the result that unpackaged imports are entitled to a lesser degree of immunity under the Import-Export Clause than is recognized in the case of packaged imports. This group of arguments will be discussed under subsequent headings of this Reply Brief.

Whether or not the first group of arguments, if presented to the tribunal which has authority to restrict the scope of operation of the Import-Export Clause, would be effective to produce the results sought by the tax officials, we do not undertake to determine. In such event opposing policy arguments would of course be presented to the tribunal, including those which led the Framers of the Federal Constitution to adopt the Import-Export Clause. Such opposing policy arguments would include the desirability of giving to the Federal Government exclusive control over imports, in order to avoid a situation such as existed in Europe prior to the establishment of the Common Market; the desirability of providing the Federal Government with a source of revenue, consisting of duties imposed on imports; and the benefit to citizens of inland states where the imported goods will come to rest at a final destination, of having such imported goods flow through to such final destination states without being burdened by taxes by the seaboard states or other states through which the imported goods pass on their way to the state of final destination.

Insofar as the tax officials' arguments ask this Court to overrule *Brown* v. *Maryland, Low* v. *Austin* and other decisions of this Court interpreting and applying the Import-Export Clause, we believe that the tax officials are really asking this Court, in practical substance and effect, to revise and amend the Import-Export Clause. For example, the tax officials ask this Court to hold that the Import-Export Clause prohibits, not "any" tax, but "any discriminatory" tax. Such argument was rejected by this Court in *Low* v. *Austin,* 13 Wall. 29 (1872), and was rejected again in *Richfield Oil Corporation* v. *State Board of Equalization,* 329 U.S. 69 (1946), in which the Court said, at 76: "It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax."

By its very terms, the Import-Export Clause gives Congress exclusive authority to consider and then consent to, or disapprove, a tax on imports by the States. Therefore, Congress, and not this Court, is the appropriate tribunal to consider the policy arguments which in substance and practical effect ask this Court to revise and amend the Import-Export Clause. This Court, in *Hooven and Allison Co.* v. *Evatt,* 324 U.S. 652 (1945), at 668, has already held that the Import-Export Clause gives to Congress the authority to consent to state taxation of imports and hence to lay down its own test for determining when the immunity ends.

If the tax officials can persuade Congress that their policy arguments are sound, Congress will no doubt enact legislation to produce the result sought by such tax officials. In any event, the Import-Export Clause by its terms requires such consent, and the procedure established by the Constitution should be followed.

B. Unpackaged Imports Should Not Have A Lesser Degree Of Immunity From Local Taxation Than Is Recognized Where Packaged Imports Are Involved.

There is an unexplained inconsistency in the Supreme Court of Georgia's decision. The Georgia Court correctly holds that the packaged imported tubes are immune from local taxation under the "original package" doctrine, notwithstanding the fact that such tubes are segregated by size and style, and are stacked with other packaged imported tubes of the same size and style in Michelin's warehouse. Yet the Georgia Court holds that segregating and stacking unpackaged imported tires in exactly the same manner results in loss of immunity from taxation. (A. 36; and pages A-17 and A-18 of Appendix to Michelin's Petition For A Writ Of Certiorari)

It will thus be seen that:

First, with respect to the imported unpackaged tires, Michelin is asking for immunity from local taxation only to an extent parallel and comparable to that which is recognized with respect to packaged imports.

Second, the Georgia Court has held, and the tax officials are asking this Court to hold, that unpackaged imports have a lesser degree of immunity from local taxation than is recognized in the case of packaged imports.

We respectfully submit that no persuasive reason can be given which would justify such discrepancy of treatment, and that the aim and purpose of the Import-Export Clause is to allow with respect to all imported goods, whether packaged or unpackaged, a uniform degree of immunity from local taxation.

C. The "Original Form" Factor.

In *Brown* v. *Maryland*, Chief Justice Marshall said that if "the thing imported" is held by the importer, in his warehouse, in the "original form or package" in which it was imported, it is immune from local taxation. 12 Wheat. 441-442.

The natural and reasonable meaning of the language just quoted from *Brown* v. *Maryland* is that if "the thing imported" was imported in a package, it must remain in the "original package" in which it was imported in order to retain immunity from local taxation, or, if "the thing imported" was imported without packaging, it must remain in the unaltered "original form" in which it was imported in order to retain immunity from local taxation. As shown at pages 8-9 of our Main Brief, the Courts of New York, North Carolina and Florida have held that, with respect to unpackaged imports, the words "original form" have the meaning which we have just described.

If the words "original form" are given, with respect to unpackaged imports, the meaning which we have just suggested as being the reasonable and natural meaning of such words, the result will be that the unpackaged imports will be accorded a degree of immunity from local taxation parallel and comparable to that which is recognized with respect to packaged imports which are held by the importer in the "original package" in which they were imported. Controversies over what amount of wrapping constitutes a package will not arise and strained mechanical rules of law based on distinctions without differences need not be developed. Sensible certainty will be brought to the meaning of the Import-Export Clause without encouraging importers to mock reality by packaging things imported where it makes no sense to do so.

In their briefs, the tax officials try to ascribe to the words "original form" certain narrow and unnatural meanings which would result in unpackaged imports being accorded a lesser degree of immunity from local taxation than what is recognized in the case of packaged imports.

In the California Amici Brief, at page 64, it is suggested that "the original form had reference to the collective form of the goods as shipped." In *Brown* v. *Maryland,* Chief Justice Marshall spoke in terms of whether or not "the thing imported" was held by the importer in the "original form or package" in which it was imported. It is hard to believe that when he referred to "the thing imported" what he really had in mind was "the collective form of the goods as shipped".

In the Georgia Amicus brief, at page 44, the argument is made that: "Thus the term 'original form' is properly applicable apart from the term 'original package' only when used in reference to items incapable of packaging or capable of physical processing, such as ores, oil, etc." We do not believe that the language used by Chief Justice Marshall in *Brown* v. *Maryland,* as shown above, can reasonably be read as carrying the limited and unnatural meaning ascribed to the words "original form" in the sentence just quoted from the Georgia Amicus Brief.

Except as otherwise indicated in the two preceding paragraphs, the tax officials apparently ask the Court to ignore and disregard, and to treat as being meaningless, the words "original form" which have been repeatedly used by this Court in the *Brown* v. *Maryland* line of decisions.

To summarize, we respectfully submit that the tax officials have failed to give any convincing answer to Michelin's argument that the unpackaged imported tires, while in Michelin's warehouse, were in the "original form" in

which they were imported, and therefore, under the "original form or package" doctrine, were immune from local taxation.

D. The Importer's Right To Sell The Imported Goods, In The Original Form Or Package In Which Imported, Free Of Local Taxation.

In support of our argument that Michelin has the right to sell the imported tires, in the "original form" in which imported, free of local taxation, we rely on *Brown* v. *Maryland,* and on the fact that in *Youngstown Sheet and Tube Company* v. *Bowers,* 358 U.S. 534 (1959), the Court, at 540, quoted with approval from *Brown* v. *Maryland* the statement that one who had imported a "thing" for the purpose of selling it, had, "by payment of the duty to the United States, [acquired the] right to dispose of his merchandise, as well as to bring it into the country," and that the State could not tax it "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported." In note 7 to the *Youngstown* decision, the Court affirmatively stated that it is "well-settled" that goods imported for sale lose their character as imports "upon being sold." 358 U.S. 541. This position cannot be reconciled with the tax officials' position that goods imported for sale lose their character as imports at some point prior to sale.

The tax officials present a number of arguments as to why the imported tires should become subject to local taxation prior to their being sold by Michelin. Such arguments will be discussed under other headings below in this Reply Brief. At this point, we limit our comment on such arguments to pointing out that, in order to accept any one or more of such arguments, this Court would have to overrule *Brown* v. *Maryland,* and would have to disaffirm what it

reaffirmed in *Youngstown,* as shown above, namely, that the importer does acquire, by payment of the import duty, the right to sell the imported goods, in the original form or package in which they were imported, free of local taxation.

We respectfullly submit that the decisions in *Brown* v. *Maryland* and in *Youngstown* are sound and correct; that such decisions should be followed; and that the tax officials should look to Congress, and not to this Court, for the relief which they are seeking.

E. The "Final Destination" Factor.

We believe that substantial weight should be given to the fact that the imported tires flow out from Michelin's warehouse to tire dealers scattered throughout six states, and it is such tire dealers who sell the tires at retail, and for local consumption, at the point of "final destination".

In support of our view, we rely on the following:

First, one of the important reasons for the inclusion in the Federal Constitution of the Import-Export Clause was the desire to prevent the seaboard states from levying taxes on goods flowing through to inland states. 2 Farrand, Records of the Federal Convention (1911), 441, 442. In *Youngstown* the Court said: "The constitutional design was then to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports." 358 U.S. 545.

Second, the itinerant peddler example referred to in *Brown* v. *Maryland* indicates that Chief Justice Marshall meant to attach considerable weight to the "final destination" factor, because it is reasonable to assume that an itinerant peddler would normally sell the imported goods

at retail, and for local consumption, at the point of final destination.

Third, in *Youngstown,* the Court gave major weight to the fact that the "importation journey definitely had ended" and that the imported materials were irrevocably committed to use in manufacturing at the "point of final destination". 358 U.S. 546.

In support of their effort to disregard the "final destination" factor, the tax officials advance the following arguments:

In the Georgia Amicus Brief, at pages 38-39, it is argued that the tires, while in Michelin's warehouse, should not be considered as being in the flow of import distribution, because events might possibly happen which would result in some one or more of the tires remaining in such warehouse indefinitely. We respectfully submit that the kind of remote possibility just referred to is substantially outweighed by the uncontradicted evidence showing that the tires flow out from Michelin's warehouse to tire dealers scattered throughout six states (A. 26, 29, 53-54), and by the Georgia Supreme Court's statement that: "All the tires and tubes in the Gwinnett warehouse are sold to franchised Michelin dealers in six southeastern states." (Page A-8 of Michelin's Petition For A Writ of Certiorari)

The California Amici, at pages 65-67 of their Brief, discuss our "flow of import distribution" argument but cite no persuasive authority in support of their attempt to disregard and ignore the "final destination" factor. The Dakin article, referred to at page 67 of the California Amici Brief, gives major weight and emphasis to the "final destination" factor, and clearly recognizes that imported goods should retain their immunity from local taxation while "still in the hands of the importer and held for possible

sale into the interior part of the country". Dakin, 19 La. Law Review 760; and see also the discussion at pp. 766, 770 and 774.

To summarize, the tax officials have shown no persuasive reason why the "final destination" factor should be disregarded and ignored. For reasons shown above, we believe that such "final destination" factor should be given substantial weight in determining whether or not the imported tires, while in Michelin's warehouse, were still in the flow of import distribution and were still imports.

F. The "Segregating By Size And Style" Factor.

For the reasons set forth below, we believe that the tax officials' "segregating by size and style" argument is unconvincing and should be rejected.

Our view is based on the following considerations:

If applied to unpackaged imports only, the tax officials' "segregating by size and style" argument would result in holding that unpackaged imports have a lesser degree of immunity from local taxation than is recognized where packaged imports are involved. If applied to packaged imports as well as to unpackaged imports, the result would be to overrule to a major extent, with respect to packaged imports, the "original package" doctrine established by the *Brown* v. *Maryland* line of decisions.

Segregating and stacking the imported tires by size and style does not change the "original form" in which each tire is imported, and therefore, under the *Brown* v. *Maryland* line of decisions, the imported tires are immune from local taxation because they are held by Michelin, in its warehouse, in the "original form" in which they were imported.

In order to accept the tax officials' contention, the Court would have to overrule the *Brown* v. *Maryland* holding

that an importer, by payment of the federal import duty, acquires the right to sell the imported goods, in the original form or package in which they were imported, free of local taxation.

Segregating the tires by size and style does not alter the fact that the tires flow out from Michelin's warehouse to tire dealers scattered throughout six states, and therefore, while in such warehouse, are still in the flow of import distribution, and are still imports. It is such tire dealers who, like the itinerant peddler referred to in *Brown* v. *Maryland*, sell the tires at retail, and for local consumption, at the point of final destination.

The courts of Florida and North Carolina have correctly held, as shown at page 13 of our Main Brief, that segregating unpackaged imported goods by size and style, and stacking them with other unpackaged imported goods of the same size and style, does not result in loss of immunity from local taxation, so long as each unpackaged article is kept in the "original form" in which it was imported.

The tax officials, in support of their position, rely on the following arguments:

They argue that by segregating the imported tires by size and style, Michelin is engaging in business as a wholesale distributor, with resulting loss of immunity from local taxation. Their argument appears to be that an importer can engage in the business of acting as importer, without loss of immunity from local taxation, but if the importer engages in the business of selling the imported goods as a wholesale distributor, there is a resulting loss of immunity from local taxation. Under such view, an importer, in order to retain immunity from local taxation, apparently would be required to import the goods solely for the purpose of doing nothing at all with them. Such an argument cannot

be reconciled with the holding in *Brown* v. *Maryland*, which this Court affirmed in *Youngstown*, that the importer, by payment of the import duty, acquires the right to sell the goods, in the original form or package in which they were imported, free from local taxation.

The tax officials rely heavily on several state court decisions holding that the entire shipment is an "invisible gossamer" which is broken when any single article is removed from the shipment. This "invisible" package argument is answered at pages 15-16 of our Main Brief. If applied in the case of unpackaged imports only, such "invisible" package argument would result in an unjustifiable discrepancy of treatment as between packaged imports and unpackaged imports. If applied to packaged imports also, such "invisible" package argument would be in direct conflict with the *Brown* v. *Maryland* "original package" doctrine because, in such event, the packaged imports would lose their immunity from local taxation if any single packaged import is removed from the entire shipment, notwithstanding the fact that all of the packaged imports are at all times held by the importer in the "original package" in which imported.

The tax officials say that their argument here discussed is supported by the decision in *May* v. *New Orleans*, 178 U.S. 496 (1900). *May* v. *New Orleans* holds that where a shipping carton containing smaller packages of imported goods is opened by the importer, the breaking of such "original package" shipping carton results in loss of immunity from local taxation. The decision is rested entirely on the ground that an "original package" was broken, which everyone admits results in loss of immunity from local taxation. In our case here, no "original package" was broken because the tires were imported without packaging and there never was any "original package" to

break. *May* v. *New Orleans* is completely silent with respect to goods imported without packaging. We fail to see how a decision which is rested solely and exclusively on the ground that an "original package" was broken by the importer can be considered as having any bearing on a situation where no "original package" has been broken by the importer. Incidentally, Michelin has given full effect to the soundness of the *May* v. *New Orleans* principle by admitting taxability with respect to imported tubes where the tubes remain in their individual packages but such individual packages are removed from the larger shipping carton. (A. 10, 11, 35)

To some extent, the tax officials seem to interweave their "segregation of goods by size and style" argument, here discussed, with their arguments based on the decision in *Youngstown*. The *Youngstown* decision is discussed under heading G below, and we show there that, contrary to the tax officials' contentions, the decision in *Youngstown* helps Michelin's case and hurts the tax officials' case.

For the reasons set forth above, we respectfully submit that the tax officials' "segregation by size and style" argument is unsound, is inconsistent with the *Brown* v. *Maryland* line of decisions, and should be rejected.

G. The *Youngstown* Decision.

In *Youngstown*, as we have shown under Heading D above, the Court quoted with approval from *Brown* v. *Maryland* the statement that an importer acquires, by payment of the import duty to the United States, the right to sell the imported goods, in the original form or package in which they were imported, free of local taxation. Under this principle, Michelin is entitled to sell the imported tires in the original form in which they were imported, free of local taxation.

As we have shown under Heading E above, the Court in *Youngstown* gave major weight to the fact that the "importation journey definitely had ended" and that the imported materials were irrevocably committed to use in manufacturing at the "point of final destination". In our case, the "final destination" factor works strongly in Michelin's favor, by reason of the fact that the imported tires flow out from Michelin's warehouse to dealers scattered throughout six states, and it is such dealers who sell the tires at the point of final destination.

The tax officials' reliance on *Youngstown* centers around the statement in *Youngstown* that the imported materials there involved, which were imported for use in the importer's manufacturing operation, became taxable when they were "put to the use for which they were imported". The Court held that such imported materials, to the extent that they were required to be kept on hand at the importer's manufacturing plant to meet current operational needs, had been put to the use for which they were imported.

The tax officials' argument is that where goods are imported for the purpose of being sold by the importer, such imported goods have been "put to the use for which they were imported" when the importer gets ready to sell them or offers them for sale. Our view is that where goods are imported for the purpose of being sold by the importer, such goods have not been "put to the use for which they were imported" until they are sold. This is clearly the view of *Brown* v. *Maryland*, and is clearly the view which the Court in *Youngstown* had in mind when it quoted with approval from *Brown* v. *Maryland*, the statement that one who had imported goods for the purpose of selling them, had, by payment of the duty to the United States, acquired the right to sell the goods, in the original form or package in which they were imported, free of local taxation.

It has always been recognized that immunity from local taxation ceases when the importer "uses" the imported goods for his own use. Where goods are imported for the importer's own use, close questions can arise, as in *Youngstown*, as to when such use by the importer has commenced. In *Youngstown*, the Court decided a close question as to when such use by the importer-manufacturer had commenced. The Court did not question in any way the soundness of the *Brown* v. *Maryland* "original form or package" doctrine.

By contrast, where goods are imported by the importer for the sole purpose of selling them in the original form or package in which they were imported, the line of demarcation as to when immunity from local taxation ends is much more definite and certain, because *Brown* v. *Maryland* holds, and the Court in *Youngstown* affirms, that in such event immunity from local taxation continues until the sale by the importer takes place, and because there is little room for dispute about whether the goods have or have not been sold.

To conclude that the importer, by merely offering the imported goods for sale, or by getting ready to sell them, has put them to the use for which they were imported, with resulting loss of immunity from local taxation, the Court would have to overrule the holding in *Brown* v. *Maryland*, which the Court approved in *Youngstown*.

We respectfully urge that the *Brown* v. *Maryland* line of decisions has provided, for nearly 150 years, a sound and reasonable criterion for determining when imported goods cease to be imports for the purpose of the Import-Export Clause, and that, if the tax officials feel that the immunity from local taxation should be drastically reduced from that which exists under the *Brown* v. *Maryland* line

of decisions, they should look to Congress, and not to this Court, for the relief sought.

H. The Tax Officials' Argument That The Import-Export Clause Does Not Prohibit A Non-Discriminatory Ad Valorem Property Tax.

This argument, which is urged at great length and with great skill in the California Amici Brief, was presented on behalf of the State of California, and was rejected by a unanimous court, in *Low* v. *Austin,* 13 Wall. 29 (1872). The summary of argument presented on behalf of the State of California in *Low* v. *Austin,* as set forth at 20 L. Ed. 517-518, reads like a summary of the argument made here on behalf of the California tax officials in their Amici Brief.

As shown under heading A above, in 1946 the Court again, in *Richfield Oil,* refused to hold that a non-discriminatory local tax is permitted by the Import-Export Clause, and stated that it would entail a substantial revision of such Clause to substitute for the prohibition against "any" tax a prohibition against "any discriminatory" tax.

The California Amici, at page 30 of their Brief, argue that the words "impost" and "duty" do not include a non-discriminatory property tax. A similar argument was advanced on behalf of the State of California in *Low* v. *Austin,* as shown at 20 L. Ed. 518, and was rejected by the Court. Webster's Third New International Dictionary defines "impost" as follows: "1: something imposed or levied: TAX, TRIBUTE, DUTY 2: the weight carried by a horse in a handicap race." Under the definition just quoted, the word "impost" would clearly include any tax, and this Court has correctly so held in *Brown* v. *Maryland,* in *Low* v. *Austin* and in *Richfield Oil.*

The tax officials invoke and rely on *Minnesota* v. *Blasius,* 290 U.S. 1 (1933), and decisions referred to therein, which hold that, where the Commerce Clause alone is involved, and the Import-Export Clause is not involved, a non-discriminatory local tax may be imposed on the goods involved during an interruption of transit in interstate commerce.

The Commerce Clause decisions are clearly inapplicable in our case because this Court has repeatedly and emphatically held, over a long period of years, that there is an important distinction between the degree of local taxation which is permitted under the Import-Export Clause and that which is permitted under the Commerce Clause of the Federal Constitution. The decisions so holding include *Woodruff* v. *Parham,* 8 Wall. 123 (1869); *Brown* v. *Houston,* 114 U.S. 622 (1885); *American Steel and Wire Company* v. *Speed,* 192 U.S. 500 (1904); and *Sonneborn Bros.* v. *Cureton,* 262 U.S. 506 (1923).

Thus, in *Sonneborn Bros.,* supra, the Court said, at 510: "Cases subsequent to *Brown* v. *Maryland* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from taxation fails. The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce."

In *American Steel and Wire Co.,* supra, at 521, the distinction between the two situations was described as follows: "Thus, in *Brown* v. *Maryland* there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition.

In other words, that imports could not be taxed at all until they had completely lost their character as such. *Woodruff* v. *Parham* and *Brown* v. *Houston,* on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a state so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress."

In order to sustain the tax officials' argument that the Import-Export Clause permits non-discriminatory local taxation, the Court would have to overrule all of the decisions cited above under this heading H.

We respectfully submit that such decisions are sound and correct; that such decisions are based upon a most thorough and careful consideration of what the Framers of the Federal Constitution intended; that such decisions should be followed in our case; and that if the tax officials desire to press further their policy argument in favor of permitting non-discriminatory local taxation of imported goods, they should look to the Congress, and not to this Court, for relief.

I. The Vehicle Of Transportation Argument.

The tax officials' argument that the sea van trailer or other vehicle of transportation should be considered as being an "original package" is answered at pages 18-19 of our Main Brief, and need not be discussed further except to re-emphasize the fact that treating the vehicle of transportation as being an "original package" would wipe out almost entirely all immunity from local taxation of imported goods, both packaged and unpackaged, because in every case the imported goods must be brought into this country in some vehicle of transportation, and the vehicle

of transportation must be promptly unloaded in order to free it for further use in transportation.

J. Michelin's Reason For Shipping Tires Without Packaging.

The tax officials are mistaken in their suggestion that Michelin ships the imported tires without packaging in order to obtain immunity from local taxation. It ships the tires without packaging because none is necessary. If it had shipped each tire in a cardboard carton, the Supreme Court of Georgia would undoubtedly have held, as it held with regard to the packaged tubes, that such packaged tires were immune from local taxation.

K. Petitioner Is The Importer Of The Tires And Tubes.

The tax officials' suggestion that Michelin Tire Corporation, the Petitioner herein, is not the importer of the tires and tubes in question is refuted by the affidavit testimony of Roland A. Lacroix, which clearly shows that the Petitioner herein is the importer. (A. 63, 28)

There is nothing to the contrary in the testimony of Robert E. Stone, who testified that he did not know who was the importer, and that a broker was employed simply to help with the documentation necessary for the importing of the tires and tubes into this country. (A. 42-43, 50)

L. Taxability Of The Imported Tubes.

Some of the tax officials argue that the packaged tubes as well as the unpackaged tires should be held taxable. The Supreme Court of Georgia held that the packaged tubes are not taxable (page A-18 of Michelin's Petition For A Writ Of Certiorari), and the Gwinnett County tax officials did not file a Cross Petition for Certiorari. This Court has held that a respondent may not attack in this Court that portion of a judgment below which is adverse

to him, unless he sought certiorari to review such portion of the judgment below. *LeTulle* v. *Scofield,* 308 U.S. 415 (1940).

M. The Tax Officials' "Dockside Warehouse" Argument.

The tax officials ask the Court to hold that the importer's warehouse, at which the imported goods are held in the original form or package in which they were imported, must be located at or near the dockside in order for the imported goods to retain their immunity from local taxation.

There is no suggestion in *Brown* v. *Maryland* that the importer's warehouse must be located at or near the dockside, and there is no way in which the tax officials' "dockside warehouse" argument can be reconciled with the holding in *Brown* v. *Maryland* that the importer is entitled to sell the imported goods, in the original form or package in which they were imported, free of local taxation.

N. The Tax Officials' Arguments Based On The Fifth And Tenth Amendments.

In support of their argument that the seaboard states should be permitted to levy a non-discriminatory property tax on imports flowing through to inland states, the California Amici invoke the Fifth Amendment implied guaranty of equal protection and the Retained Powers Clause of the Tenth Amendment.

Here again, under guise of asking the Court to interpret the Import-Export Clause, the California Amici are really asking the Court to amend the Import-Export Clause, for, as the Court said in *Richfield Oil,* supra: "It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax." 329 U.S. 76.

The Framers of the Constitution made a policy decision that seaboard states should not, without the consent of Congress, be permitted to levy any tax on imports flowing through to inland states, except what might be absolutely necessary for executing their inspection laws. The California Amici are asking this Court to reverse that policy decision by permitting seaboard states to levy substantial taxes on imports flowing through to inland states.

O. Decisions Involving Exports.

Decisions involving goods exported from this country are not relevant in our case here, because:

First, where exports are involved, there is nothing comparable to the *Brown* v. *Maryland* "original form or package" doctrine which is of central importance in our case.

Second, where exports are involved, there is nothing comparable to the *Brown* v. *Maryland* holding that an importer, by payment of the import duty, acquires the right to sell the imported goods, in the original form or package in which they were imported, free of local taxation.

P. The Tax Officials' *Clyde Mallory* Argument.

Clyde Mallory Lines v. *Alabama,* 296 U.S. 261 (1935), relied upon by the tax officials, holds that a service charge, which is not a tax, is not prohibited by the Article I, Section 10, Clause 3 prohibition against a duty of tonnage. In our case, the amount sought to be collected by the Gwinnett County tax officials is clearly a tax, and not a service charge.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this Court should reverse that portion of the Supreme Court of Georgia's decision which holds the imported tires to be taxable, and should hold that such imported tires are immune from local taxation.

Respectfully submitted,

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Certificate of Service

I hereby certify that all parties required to be served have been served and that on this 7th day of October, 1975, I forwarded by U. S. air mail, postage prepaid, three copies of the foregoing Brief to each of the following:

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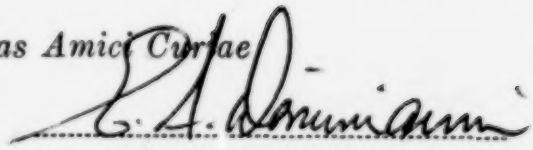

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